Supreme Court, U. S.
FILED
MAY 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

J. PAUL MCGRATH
Attorney for Petitioner
The Chase Manhattan Bank, N.A.
140 Broadway
New York, New York 10005

JOHN T. KLUG
Attorney for Petitioner
Citibank, N.A.
53 Wall Street
New York, New York 10005

Of Counsel:

BOB D. MANNIS
Dewey, Ballantine, Bushby,
Palmer & Wood

W. FOSTER WOLLEN
Shearman & Sterling

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
1. The Court of Appeals' decision conflicts with this Court's decisions concerning state taxation of national banks and the language of Pub. L. No. 91-156	8
2. The Court of Appeals' decision erroneously looks to state, rather than federal, law in characterizing the tax	13
Conclusion	16
Appendices	
A. Judgments of the Court of Appeals of the State of New York	A-1
B. Opinions of the Court of Appeals of the State of New York	B-1
C. Order of the Court of Appeals of the State of New York Denying Reargument	C-1
D. Decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department	D-1
E. Final Determinations, Findings of Fact, Conclusions of Law and Decisions of the Finance Administration of the City of New York	E-1
F. Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548 (1957)	F-1
G. Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775	G-1
H. Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974)	H-1

Authorities Cited

Cases:

	PAGE
Diamond National Corp. v. *State Board of Equalization*, 425 U.S. 268 (1976)	7, 13, 15
First Agricultural National Bank v. *State Tax Commission*, 392 U.S. 339 (1968)	4, 7, 8, 11, 13
First National City Bank v. *City of New York Finance Administration*, 36 N.Y.2d 87 (1975)	10n
Iowa-Des Moines National Bank v. *Bennett*, 284 U.S. 239 (1931)	8
Jerome v. *United States*, 318 U.S. 101 (1943)	14-15
Kentucky Tax Commission v. *Jefferson Motel, Inc.*, 387 S.W.2d 293 (Ky. 1965)	15
M'Culloch v. *Maryland*, 17 U.S. 415, 4 Wheat. 316 (1819)	7
Owensboro National Bank v. *Owensboro*, 173 U.S. 664 (1899)	8
Society for Savings v. *Bowers*, 349 U.S. 143 (1955)	13, 15

Statutes:

Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775	2-10, 12-15
Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111	7
Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974)	3, 10n, 11
N.J. Stat. Ann. § 54:4-2.3 (West 1960)	15
Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548 (1957)	2-5, 8, 11, 12, 15
28 U.S.C. § 1257(3) (1966)	2

Other Authorities:

	PAGE
H.R. Rep. No. 91-728, 91st Cong., 1st Sess. 5 (1969); 1969 *U.S. Code Congressional and Administrative News* 1602-03	10
S. Rep. No. 91-530, 91st Cong., 1st Sess. 6 (1969); 1969 *U.S. Code Congressional and Administrative News* 1594	9-10
Rand McNally & Co., *International Bankers Directory* (1st 1977 ed.)	7n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners The Chase Manhattan Bank, N.A. and Citibank, N.A. petition for a writ of certiorari to review the judgments of the Court of Appeals of the State of New York dated and entered December 21, 1977. Separate judgments were entered as to Chase and Citibank, but the cases were consolidated for purposes of briefing and oral argument, and only one opinion was written by the Court of Appeals. Because the cases involve identical questions, a single petition has been filed under Rule 23(5) of the Rules of this Court.

Opinions Below

The majority and dissenting opinions of the Court of Appeals of the State of New York are reported at 43 N.Y.2d 425, 372 N.E.2d 789 and 401 N.Y.S.2d 1001, and

appear in Appendix B. The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is reported at 55 A.D.2d 531 and 389 N.Y.S.2d 547, 1021, and appears in Appendix D. The Finance Administration of the City of New York issued separate final determinations, findings of fact, conclusions of law and decisions as to each petitioner, none of which has been reported but which appear in Appendix E.

Jurisdiction

The judgments of the Court of Appeals were entered on December 21, 1977. A timely motion for reargument was denied (Appendix C) on February 22, 1978, and this petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1966).

Questions Presented

Whether the New York City commercial rent or occupancy tax is invalid for the periods in question as applied to petitioners, national banks, because Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548, *as amended by* Pub. L. No. 91-156, 83 Stat. 434 and Pub. L. No. 92-213, § 4(a), 85 Stat. 775, prohibited the application of such tax to national banks absent state legislation affirmatively imposing that tax on national banks.

This question involves the following subsidiary questions:

1. Whether the requirement in Pub. L. No. 91-156 of affirmative legislative action authorizing the imposition on national banks of certain taxes was complied with by the New York State legislature when the legislature only increased the general rate of taxation but took no action to change the incidence of taxation to include national banks.

2. Whether in construing the language of Pub. L. No. 91-156, the Court of Appeals properly characterized the commercial rent or occupancy tax as one on tangible personal property under state law in disregard of the terms of Pub. L. No. 91-156 and pertinent decisions of this Court as to the interpretation of federal statutes.

Statutes Involved

The federal statutes involved are Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548 (1957); and the Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775. These statutes are set forth in Appendices F and G. The New York statute involved is Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974), set forth in Appendix H.

Statement of the Case

The Chase Manhattan Bank, N.A. and Citibank, N.A. are national banks that lease and occupy premises in New York City for the purposes of business.

During 1973, the Finance Administration of the City of New York sent Chase and Citibank notices of determination which included assessments for alleged deficiencies in payment of the New York City commercial rent or occupancy tax (the "Commercial Rent Tax") for the tax years ended May 31, 1971 and May 31, 1972. The Commercial Rent Tax is a tax levied on persons occupying premises for commercial purposes based on the rent paid for such occupancy. Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974).

At hearings requested by the banks and held before the Finance Administration, the banks argued that they are immune from the Commercial Rent Tax for the periods in question under applicable federal laws, *i.e.*, 12 U.S.C. § 548 and Pub. L. No. 91-156, as amended, which govern the extent to which national banks may be taxed by state and local governments, and this Court's decision in *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968).

In December 1975 and March 1976, the Finance Administration's referee issued separate findings of fact, conclusions of law and decisions with respect to Citibank and Chase. (Appendix E) The referee concluded that notwithstanding their status as national banks, the banks are liable for the Commercial Rent Tax. Final determinations were issued by the Finance Administration in an aggregate amount of $4,197,907.39, plus interest. (Appendix E)

Chase and Citibank commenced proceedings in the Supreme Court, New York County, to reverse and annul the determinations of deficiencies, again relying on the federal statutes and *First Agricultural National Bank* v. *State Tax Commission*. The proceedings were transferred for hearing to the Appellate Division of the Supreme Court and consolidated for purposes of oral argument.

In the Appellate Division, the banks argued that in 12 U.S.C. § 548 Congress enumerated the only ways in which states and their subdivisions could tax national banks and that the Commercial Rent Tax was not one of the permissible methods of taxation. Although in 1969 Congress amended 12 U.S.C. § 548 to permit national banks to be generally subject to the same state and local taxes as state banks, prior to January 1, 1973, any tax in effect before the enactment of Pub. L. No. 91-156 (the legislation amending 12 U.S.C. § 548) and not previously imposed on national banks—*i.e.*, a tax such as the Commercial Rent Tax—could

be imposed only if its imposition was authorized by affirmative state legislative action. Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775. No such affirmative action had occurred and, accordingly, Chase and Citibank argued that the Commercial Rent Tax could not be lawfully imposed on national banks.

On December 6, 1976, by a four-to-one vote, the Appellate Division confirmed without opinion the final determinations of the Finance Administration. (Appendix D) The dissenting judge, however, found that under 12 U.S.C. § 548 and Pub. L. No. 91-156 the Commercial Rent Tax was illegally imposed on national banks.

In a consolidated appeal before the Court of Appeals, the banks again argued that under applicable federal law for the period in question national banks are immune from taxes such as the Commercial Rent Tax. In a four-to-three decision (opinion by Judge Fuchsberg), the Court of Appeals held that the Commercial Rent Tax can be lawfully imposed on national banks for the period prior to January 1, 1973. (Appendix B)

That decision is based on the Court of Appeals' erroneous construction of two key provisions in Pub. L. No. 91-156. First, the Court of Appeals decided that the "affirmative action" mandated by Pub. L. No. 91-156 does not require a conscious or positive decision by the legislature to impose a tax on national banks previously immune from such tax. Thus that court was able to find that a 1970 amendment by the state legislature to the Commercial Rent Tax which merely raises the rate of taxation for those taxpayers already subject to the tax, but which gives no hint of any consideration of Pub. L. No. 91-156 or imposition of the tax on previously-immune national banks, constitutes the requisite affirmative action.

Second, the Court of Appeals decided that the Commercial Rent Tax is exempt under section 3(b) of Pub. L. No. 91-156 because it is a tax on tangible personal property

under New York state law, so that the tax can be imposed on national banks even in the absence of affirmative action of the state legislature.

The three dissenting judges in the Court of Appeals disagreed with the majority on both grounds. Concluding that the affirmative action required by Pub. L. No. 91-156 is "a conscious and manifested determination on the part of the state legislature to subject national banks to the imposition of the permitted state taxes," the dissent would have held that the 1970 rate amendment of the Commercial Rent Tax does not constitute such affirmative action. The dissent also disagreed with the majority's characterization of the Commercial Rent Tax as a tax on tangible personal property, saying that the question is how the tax is to be regarded under federal, not state, law.

A motion for reargument, timely filed by the banks, was denied on February 22, 1978. (Appendix C)

Reasons for Granting the Writ

The New York State Court of Appeals has erroneously decided an important question of federal law concerning the extent to which states and their subdivisions may tax national banks. That decision is in conflict in principle with numerous decisions by this Court that national banks may be taxed by the states and their subdivisions only as expressly permitted by Congress; it is also in direct conflict with the explicit language chosen by Congress to express how national banks can be taxed. The Court of Appeals has made a nullity of Congress' requirement in section 3(a) of Pub. L. No. 91-156 of "affirmative action" by state legislatures by permitting a tax such as the Commercial Rent Tax to be imposed on national banks for the period prior to January 1, 1973, even in the absence of affirmative action.

The Court of Appeals also erroneously applied state, rather than federal, standards in characterizing the tax for purposes of determining whether federal immunity exists for petitioners. For more than a century Congress and this Court have been deeply concerned with the problem of state taxation of national banks and have frequently addressed the issue. *See, e.g., Diamond National Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976); *First Agricultural National Bank* v. *State Tax Commission, supra; M'Culloch* v. *Maryland*, 17 U.S. 415, 4 Wheat. 316 (1819); Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111. By looking to New York state law to construe Pub. L. No. 91-156, the Court of Appeals has ignored this Court's firmly established rule concerning the application of federal law in determining a federally-granted right, privilege or immunity. It has also ignored the distinction clearly manifested by Congress on the face of Pub. L. No. 91-156 between a tax on the occupancy of real property and a tax on tangible personal property.

If allowed to stand, the narrow impact of the decision will be the effect on petitioners' tax liability for the Commercial Rent Tax for the period prior to January 1, 1973. The broader impact of the decision, however, falls on the at least 13 other national banks with main or branch offices[1] in New York City[2] whose liability for the Commercial Rent Tax may still be open. Moreover, there are 4,722 national banks in this country[3] whose tax liability is potentially affected by the questions raised by this petition concerning the nature of the affirmative action required by section 3(a) of Pub. L. No. 91-156 and the proper characterization of a tax under federal law for purposes of state taxation of national banks.

---

1. Rand McNally & Co., *International Bankers Directory*—New York State 94-182, 193-215 (1st 1977 ed.).

2. The state legislation for the Commercial Rent Tax applies only to cities with populations of 1,000,000 persons or more; New York City is the only city in the state with the requisite population.

3. *International Bankers Directory, supra* at P60.

1. The Court of Appeals' decision conflicts with this Court's decisions concerning state taxation of national banks and the language of Pub. L. No. 91-156.

This Court has repeatedly held that the states can tax national banks only as expressly authorized by Congress. *E.g., First Agricultural National Bank* v. *State Tax Commission, supra; Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664 (1899). That authorization is found in Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548, which, prior to its amendment in 1969, allowed states to tax national banks only by imposing a tax on the bank's equity, dividends, or income, or measured by its net income. The Commercial Rent Tax is not included within those permitted methods of taxation.

In 1969, Congress amended 12 U.S.C. § 548 to permit states to impose on national banks generally the same state and local taxes as are imposed on state banks. However, that expanded authority took effect only after January 1, 1973. Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4(a), 85 Stat. 775. For the period prior to January 1, 1973, section 3(a) of Pub. L. No. 91-156, the "Saving Provision", restricted state and local taxation of national banks as follows:

> "(a) ••• [P]rior to January 1, [1973],[4] no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless
>
> "(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

4. Athough originally to have expired on December 31, 1971, the Saving Provision of Pub. L. No. 91-156 was extended to December 31, 1972. Act of December 22, 1971, *supra*.

> "(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act."

The Saving Provision was enacted to preclude immediate imposition on national banks of taxes from which the banks were previously immune. Otherwise, in states where tax structures had been devised to provide equal tax treatment of national and state banks based on national bank immunity from certain taxes, national banks would be unfairly overtaxed if they were suddenly subject to additional taxes. S. Rep. No. 91-530, 91st Cong., 1st Sess. 6 (1969). Therefore, if national banks were to be subject to taxes from which they had previously been immune, Congress wanted the imposition of such taxes to be the product of a positive and conscious decision by the state legislature, and it imposed the requirement of affirmative action.

The importance that Congress placed on the need for affirmative action and its intention that the decision to tax national banks be manifested in a positive and unmistakable manner are revealed in the legislative history of Pub. L. No. 91-156. The Report of the Senate Committee on Banking and Currency includes the following:

> "The committee realizes that for many years the tax structure within the States has been drawn in recognition of the different positions of State and National banks with respect to liability for State taxes. In effect, the States have adopted many different formulas in an attempt to equalize the total tax burden between State and National banks. If by congressional action banks were automatically subject to taxes which they had not been previously paying, in addition to the taxes which they are now paying, the effect may be to destroy the degree of equality that the State legislature, by conscious effort, attempted to achieve. Accordingly, the committee believes it wise to require *positive State legislative action* as a prerequisite to the imposition on

banks of the additional taxes authorized by the bill." S. Rep. No. 91-530, 91st Cong., 1st Sess. 6 (1969); 1969 *U.S. Code, Congressional and Administrative News* 1594, 1598-99. (Emphasis supplied.)

Similarly, in the final Conference Report, the managers on the part of the House of Representatives stated:

> "[W]hile at the same time very firmly committing to the several States responsibility for their own tax policies, the conference substitute includes a saving provision to the effect that except for sales taxes, documentary taxes, and property taxes, *a tax may not be applied to a bank after the enactment of this legislation unless* either the tax was applicable before the enactment of this legislation, or *the State legislature authorizes its imposition by affirmative action* taken after the enactment of this legislation." H.R. Rep. No. 91-728, 91st Cong., 1st Sess. 5 (1969); 1969 *U.S. Code Congressional and Administrative News* 1602-03. (Emphasis supplied.)

Because the Commercial Rent Tax is imposed under authority of state legislation in effect prior to the enactment of Pub. L. No. 91-156[5] and was not imposed on national banks prior to that enactment,[6] it is a tax which can only be imposed by affirmative action of the state legislature according to the Saving Provision.

Notwithstanding the explicit statutory requirement that the imposition of the tax on national banks be authorized by affirmative action and the equally clear legislative history cited above, the Court of Appeals has construed the federal statute as not requiring a conscious decision by the state legislature to impose a pre-existing tax on national banks for the first time. Instead, the Court has decided that

5. Laws of New York, 1963, ch. 257, *as amended by* Laws of New York, 1970, ch. 166, N.Y. Unconsol. Laws § 9447 (McKinney 1974) (rate amendment).

6. *First National City Bank* v. *City of New York Finance Administration*, 36 N.Y.2d 87, 91-92 (1975).

action in general with respect to the tax, rather than affirmative action imposing the tax on national banks, will suffice.

Specifically, the Court of Appeals held that Chapter 166 of the Laws of New York, 1970, authorizing a general rate increase in the Commercial Rent Tax, satisfied the requirement of the Saving Provision. In its opinion, however, the state court was only able to say that the rate increase was "action" that "necessarily involved 'affirmative' conduct" because the amendment took the form of republishing the original Commercial Rent Tax statute with new rates.

The Court of Appeals was unable to cite any evidence whatsoever of a legislative decision to impose the Commercial Rent Tax on national banks, and, indeed, no such evidence exists. As the dissent (per Judge Jones) stated:

> "No shred of contemporaneous proof suggests that either the city administration or the State Legislature was even aware that section 5219 had been amended or that thereby the Congress had granted authority for expanded State taxation of national banks.
>
> "In such circumstances I cannot conclude that legislative action, taken wholly without reference to the Federal statute, constitutes the 'affirmative action' contemplated by the Congress when it authorized additional State taxation of national banks." 43 N.Y.2d at 435; 372 N.E.2d at 794; 401 N.Y.S.2d at 1006.

In *First Agricultural National Bank* v. *State Tax Commission, supra,* one of this Court's most recent cases concerning state taxation of national banks, it was decided that the Massachusetts sales tax and use tax were invalid as applied to national banks because the taxes were not among those permitted by 12 U.S.C. § 548. Rejecting the argument

that national banks could be taxed in ways other than those permitted by 12 U.S.C. § 548, this Court said:

> "Now this Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular congressional concern marked by legislation responsive to new problems." 392 U.S. at 345.

Yet, by deciding that a mere rate change, enacted without any consideration of national banks, authorized imposition of a new tax on national banks, the Court of Appeals has done what this Court would not do. The Court of Appeals has changed the precise meaning of Pub. L. No. 91-156 by disregarding the requirement of affirmative legislative action. Under the state court's decision, Congress could have merely permitted national banks to be subject to a new tax by any amendment to the taxing statute without regard to whether the amendment was related to national bank immunity. Instead, having used the words "affirmative action", Congress clearly indicated a conscious decision by the legislature, manifested in positive terms, is required before a tax such as the Commercial Rent Tax can be imposed on national banks for the period in question.

The decision of the Court of Appeals is clearly wrong and should be remedied by this Court in order properly to restrict the power of states and their political subdivisions to tax national banks and to restore the meaning of the words "affirmative action" in Pub. L. No. 91-156.

2. The Court of Appeals' decision erroneously looks to state, rather than federal, law in characterizing the tax.

As a second ground for its decision, the Court of Appeals relied on subsection (b) of the Saving Provision of Pub. L. No. 91-156 which excuses certain taxes from the requirement of affirmative action. That subsection provides:

> "b) The prohibition of subsection (a) of this section does not apply to
>
> (1) any sales tax or use tax complementary thereto,
>
> (2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or
>
> (3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,
>
> imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof."

The Court of Appeals held that because the Commercial Rent Tax is regarded under New York law as one on tangible personal property it falls within subsection (b)(3) and the requirement for affirmative action does not apply to it. The Court's error lies in characterizing the tax under state law. Because the question is whether national banks are immune from the tax under federal law, state law is not determinative as to the nature of the tax and this Court is not bound by the Court of Appeals' characterization of the tax. *Diamond National Corp.* v. *State Board of Equalization, supra; First Agricultural National Bank* v. *State Tax Commission, supra* at 347; *Society for Savings* v. *Bowers,* 349 U.S. 143 (1955).

Pub. L. No. 91-156 clearly reveals on its face that Congress did not intend that a tax on the occupancy of real property, such as the Commercial Rent Tax, be considered a tax on tangible personal property or that it be excluded from the Saving Provision. In section 1(a) of Pub. L. No. 91-156, Congress listed categories of taxes which a state could impose for the first time on a national bank with its principal office outside the state. Two of those categories are:

> "'(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.
>
> • • •
>
> '(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction."

Thus, in section 1(a) of Pub. L. No. 91-156, Congress expressly distinguished taxes on the occupancy of real property from taxes on tangible personal property. Then, in section 3(b) of the same statute, Congress designated three of the five categories of taxes found in section 1(a) to be excused from the Saving Provision and the requirement of affirmative action. Although taxes on tangible personal property were excused, taxes on the occupancy of real property—such as the Commercial Rent Tax—were not.

Only by ignoring the terms of the federal statute itself and erroneously applying state law instead could the Court of Appeals reach its decision. But as this Court stated in *Jerome* v. *United States*, 318 U.S. 101 (1943), where the question was also whether terms in a federal statute could be assigned their meaning under state law:

> ". . . we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law. That assumption is based on the fact that the application of federal legislation is nationwide. (*United States* v. *Pelzer*, 312 U.S. 399, 402) and at times on the fact that the federal program would be impaired if state law were to control." 318 U.S. at 104.

Similarly, in *Society for Savings* v. *Bowers, supra,* where the issue was whether a state property tax, essentially measured by the value of United States bonds held by two savings banks, was imposed on the banks and was therefore invalid as a direct tax on federal obligations, or on the banks' depositors and their intangible property interests in the banks, this Court stated:

> "The [state] court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax. 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.'" 349 U.S. at 151.

In *Diamond National Corp.* v. *State Board of Equalization, supra,* this Court refused to accept a state court's characterization as to the incidence of state and local taxes designed to undermine national bank immunity under federal law and reaffirmed their immunity under 12 U.S.C. § 548.

The necessity here for the rule set forth in these cases is illustrated by the differences among the states in their classification of certain taxes. For example, in Kentucky, a leasehold is considered intangible personal property, while in New Jersey, in some circumstances it may be assessed as real estate. *Compare Kentucky Tax Commission* v. *Jefferson Motel, Inc.*, 387 S.W.2d 293, 295 (Ky. 1965) *with* N.J. Stat. Ann. § 54:4-2.3 (West 1960). Obviously, for Pub. L. No. 91-156 to have uniform application throughout

the country, federal law must govern the proper characterization of taxes.

Thus, in applying principles of state law, the Court of Appeals has disregarded applicable decisions of this Court and has impermissibly expanded the power of the states to tax national banks.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: May 22, 1978

Respectfully submitted,

J. Paul McGrath
Attorney for Petitioner
The Chase Manhattan Bank, N.A.
140 Broadway
New York, New York 10005

John T. Klug
Attorney for Petitioner
Citibank, N.A.
53 Wall Street
New York, New York 10005

Of Counsel:

Bob D. Mannis
Dewey, Ballantine, Bushby,
Palmer & Wood

W. Foster Wollen
Shearman & Sterling

Appendices

APPENDIX A

Judgment of the Court of Appeals—
The Chase Manhattan Bank, N.A.

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

No. 457

THE CHASE MANHATTAN BANK, N.A.,
Appellant,

vs.

THE FINANCE ADMINISTRATION OF
THE CITY OF NEW YORK, &ANO., &C.,
Respondents.

The appellant in the above entitled appeal appeared by Dewey, Ballantine, Bushby, Palmer & Wood: *the respondent(s) appeared by* W. Bernard Richland, Corporation Counsel.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs. Opinion by Fuchsberg, J. All concur except Jones, J., who dissents and votes to reverse in an opinion in which Jasen and Wachtler, JJ., concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County,
there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 21, 1977.

Judgment of the Court of Appeals—Citibank, N.A.

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

No. 456

CITIBANK, N.A. (FORMERLY KNOWN AS FIRST NATIONAL CITY BANK),
Appellant.

vs.

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
Respondent.

The appellant in the above entitled appeal appeared by Shearman & Sterling; *the respondent appeared by* W. Bernard Richland, Corporation Counsel.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs. Opinion by Fuchsberg, J. All concur except Jones, J., who dissents and votes to reverse in an opinion in which Jasen and Wachtler, JJ., concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, New York County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 21, 1977.

APPENDIX B

Opinions of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 456

CITIBANK, N.A. (formerly known as First National City Bank),
Appellant,

vs.

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
Respondent.

No. 457

THE CHASE MANHATTAN BANK, N.A.,
Appellant,

vs.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK, &ano., &c.,
Respondents.

Argued September 6, 1977; decided December 21, 1977.

(456) W. Foster Wollen & John T. Klug, NYCity, for appellant.

W. Bernard Richland, NYC Corporation Counsel (Samuel J. Warms of counsel) for respondent.

(457) J. Paul McGrath & Bob D. Mannis, NYC, for appellant.

W. Bernard Richland, NYC Corporation Counsel (Samuel J. Warms of counsel) for respondent.

FUCHSBERG, J.

The two petitioners, who each lease and occupy premises in the City of New York, where they have their principal places of business, are banking associations chartered under the laws of the national Government. In separate proceedings, brought under CPLR article 78 and considered together, they challenge imposition upon them of the city's commercial rent tax (Administrative Code of City of New York, ch 46, tit L) covering the period from June 1, 1970 through May 31, 1972.[1]

The appeals to us are from judgments of the Appellate Division, which, one Justice dissenting, confirmed final determinations of the New York City Finance Administration adverse to the banks and dismissed their petitions.

The pivotal issue is whether, because of the provisions of applicable Federal law, the appellants, as national banks, were immune from the tax assessed for the period in question. In particular, the resolution of this case turns on an analysis of the effect on New York tax laws of the enactment of United States Public Law No. 91-156 (83 US Stat 434), which in essence permitted States and their subdivisions to tax national banks on an equal footing with State banks.

Adopted in 1969, United States Public Law No. 91-156 constituted the then latest exercise of the Federal Government's authority, recognized since the historic decision in *McCulloch v Maryland* (17 US 316, 432, 439), to allow States to tax national banks (*Agricultural Bank v Tax Comm.*, 392 US 339, 343, *Owensboro Nat. Bank v Owensboro,* 173 US 664; see, also, *Liberty Nat. Bank & Trust Co. v Buscaglia,* 26 AD2d 97, revd 21 NY2d 357, affd upon rearg 23 NY2d 933).

1. Correctness of the amounts assessed ($2,702,909.84 in petitioner Citibank's case and $3,097,732.94 in that of petitioner Chase) does not appear to be in dispute.

As its legislative history makes clear, the passage of the 1969 statute was precipitated by State reaction to the United States Supreme Court decision in the *Agricultural Bank* case *(supra).* In its holding that Massachusetts could not apply its sales tax to purchases made by national banks within its boundaries the court there reiterated that Federal statutory enumeration of the taxes States might levy on national banks carried with it a prohibition on the imposition of any others (see 115 Congressional Record 19909 [1969]; HR Rep No. 91-290, 91st Cong, 1st Sess, pp 6-7 [1969]). In the wake of that decision, a large number of States and localities found themselves deprived of tax sources on which they had come to rely; representatives of the overwhelming majority of these pressed Congress to relieve their plight (see Testimony Received in Consideration of HR 7491 and Related Bills: Hearings Before the House Committee on Banking and Currency, 91st Cong, 1st Sess 6-27 [1969]; for the effects in New York see *Liberty Nat. Bank & Trust Co. v Buscaglia, supra).*

Public Law No. 91-156 brought a two-stage change in section 5219 of the United States Revised Statutes (US Code, tit 12, § 548); it provided for "temporary" and "permanent" amendments. The "permanent" change eliminated the exemption of national banks from taxes to which State banks were subject in the State where the national banks' principal offices were located; this change, to go into effect on January 1, 1972 (Public Law No. 91-156, § 2, subds [a], [b]), subsequently was delayed until January 1, 1973 (Public Law No. 92-213, § 4, subd [a]; 85 US Stat

775).[2] The "temporary" one (Public Law No. 91-156, § 1) and a "saving provision" (§ 3) were (as amd by Public Law No. 92-213) to govern taxation of National banks during the transition period between December 24, 1969, the enactment date of the new law, and January 1, 1973.

It is on subdivision (a) of section 3 of the saving provision that appellants rely.[3] They point out that, during the temporary period, that section protected national banks from losing any pre-existing immunity from State tax laws unless and until the Legislature of a State took "affirmative action" to apply such taxes to them. The banks also assert that the New York City commercial rent tax, which had been in force since 1963, when it was authorized by chapter 257 of the Laws of New York of that year, was neither newly enacted nor the object of the requisite "affirmative action" of the Legislature before the tax assessments in litigation here were levied. For its part, the city's position is that its exercise of "affirmative action" is to be found in the passage by the New York State Legislature of chapter 166 of the Laws of 1970 which modified the original State law authorizing the rent tax, this though the 1970 enactment did not expressly refer to national banks.

2. It is agreed that appellants have been subject to the New York City rent tax since that time and therefore this litigation encompasses no subsequent period.

3. The pertinent text of subdivision (a) of section 3 of the Public Law No. 91-156 reads as follows:

"(a) * * * [P]rior to January 1, [1973], no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

"(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

"(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act."

Having fully considered these contentions, and, in the course of doing so, other pertinent provisions of Public Law No. 91-156 as well, we hold, on two independent grounds, that the rent tax was properly levied on the petitioners for the period in question.

Because the parties have preferred to focus on whether there was "affirmative action", we initially discuss the effect of legislation by which the city's commercial rent tax was amended to increase its rates significantly as of June, 1970 (L 1970, ch 166, amdg Administrative Code of City of New York, § L46-1.0, subd 3).[4] We conclude that its passage constituted such action.

The banks seek to read into the Federal statute a requirement that, before imposition of State taxes on national banks, even though the levying statute is a general one, a conscious and explicit decision had to be made to subject these banks to the tax.[5] But the Federal statute contains no such requirement. And, since even legislative decisions to allow existing rules of law to stand may be dynamic in their effect, where they bring meaningful increases in the rates of a revenue measure it is difficult to perceive how they can be regarded as anything but permeated with "action".

Moreover, the mode of enacting amendments is to re-enact the statute as amended much as a codicil republishes a will. It is a well-established proposition of law that an amend-

4. In a graduated scale, the rates were increased up to a maximum of 50% over the immediately pre-existing ones.

5. While the city may not have gone through the formality of expressing an intent to regard the amendment to the tax law as "affirmative action", it had already made known its ongoing concern with the question of the tax's continued viability in a letter submitted to the relevant Congressional Committee by a Representative who had authored remedial legislation (Testimony [on] HR 7491, pp. 14-15).

ment is a re-enactment of the statute amended, albeit without any break in the continuity between the statute before amendment and the statute after amendment (see *Lyon v Manhattan Ry. Co.*, 142 NY 298, 303-304). In fact, draftsmen of bills and other interested members of Legislatures, in considering bills providing for amendments, read them against existing law. And an amendment is enacted exactly like a wholly new statute. Thus, the amendment to the tax statute here, passed by the New York State Legislature and signed by the Governor, necessarily involved "affirmative" conduct.

From the point of view of Congress, it was the possibility that inequitable or double taxation might be imposed immediately on national banks that was the crux of its concern. There was certainly nothing in the legislative history to suggest an intention to postpone taxation on national banks under general statutes like New York City's commercial rent tax law. To the contrary, the saving provision was designed to avoid upsetting sophisticated, delicately balanced State statutes enacted to equalize taxation between bank and nonbank entities; the Congressional Managers' Conference Report makes that most evident (1969 US Code, Congressional and Administrative News, vol 2, pp 1594, 1598-1599, 1602). Since any State legislative attempt to amend such a statute unavoidably would alert the Legislature to enactment of the new Federal statute, the saving provision therefore could be effected without requiring the States to mention national banks explicitly in amendatory tax legislation.

We, therefore, turn now to the other, and at least equally dispositive ground for our determination. It derives from subdivision (b), rather than subdivision (a), of section 3

of Public Law No. 91-156. Subdivision (b) of section 3 expressly provides that the prohibition of (a) "does not apply to * * * any tax on tangible personal property * * * or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property imposed by a State". Such taxes are by its terms excused entirely from the requirement for either affirmative action or new enactment. For these excepted taxes, the "temporary" amendment of section 5219 allowed automatic imposition of nondiscriminatory State taxes without any further legislative input.

New York City's commercial rent tax from its inception has been and continues to be regarded as one on tangible personal property. Judge (later Chief Judge) Fuld, in *Ampco Printing-Advertisers' Offset Corp. v City of New York* (14 NY2d 11), spelled out the precise nature of the property interest of commercial tenants embraced by this local law. After describing the tax as one "imposed on a tenant of taxable premises according to his base rent for the tax year", and noting that "'tenant' is defined as anyone who pays rent as lessee, sublessee, licensee or concessionaire", he continues, more generally, "'It is significant to note that nowhere in the Tax Law has the Legislature characterized a leasehold as taxable real property. Such omission is understandable, as a lease for years is deemed personalty [cases cited].' * * * In any event, though, the tax could not be considered a tax on 'intangible' personal property. A leasehold has consistently been regarded as tangible. (See, e.g., *People ex rel. American Ice Co. v State Bd. of Tax Comrs.*, 153 App. Div., 532, 539 [majority opinion], 541 [minority opinion], mod. 207 N. Y. 766 * * *.)" (*Ampco Printing-Advertisers' Offset Corp. v City of New York*, 14 NY2d 11, 20, 21, 22, *supra*, app dsmd 379 US 5.)

The proposition that a leasehold constitutes tangible personal property for tax purposes has cut both ways. In the *Ampco* case, it resulted in validation of a tax liability; in *Matter of Fort Hamilton Manor v Boyland* (4 NY2d 192) and in *Matter of Grumman Aircraft Eng. Corp. v Board of Assessors of Town of Riverhead* (2 NY2d 500, 507, cert den 355 US 814) it led to mitigation or removal of a tax burden. Also pertinent, in light of subdivision (b) of section 3's reference not only to "any tax on tangible personal property" but to an "excise * * * tax imposed on the ownership [or] use" of such property as well, is that, in *Ampco* (*supra,* at pp 21, 23), the court characterizes the tax here as an excise tax on the use of property. (See, also, *Matter of Penney Co. v Lewisohn,* 40 AD2d 67, affd 33 NY2d 528; 2 Powell, Real Property, par 221, subd[2].)

The correctness of this conceptualization of a leasehold interest as tangible personal property in the context of Public Law No. 91-156 is underscored upon further research of that statute's legislative history. Thus, while our attention has not been directed to any report separately discussing a State-imposed rent tax on facilities used by a national bank in the State where its principal office is located, we find it significant that subdivision (a) of section 1 explicitly validates such taxes when imposed by a State on a national bank whose principal office is in another jurisdiction. It does so, *inter alia,* by authorizing a tax on "the occupancy of real property" of such out-of-State national banks (Public Law No. 91-156, § 1, subd [a], amdg US Rev Stat, § 5219, subd 5 par [b], cl [2]).

Furthermore, referring to this amendment, the Senate Committee on Banking and Currency minced no words in reporting that "the taxes listed in the new section 5 (b) * * * are not considered to be taxes on intangible personal property as that term is used in the new section 5 (a), and they could be imposed on national banks by the States during the period up to January 1, 1972, as well as after that date" (US Sen Rep No. 91-530, 91st Cong., 1st Sess 3 [1969]; 1969 US Code, Congressional and Administrative News, vol 2, pp 1595-1596).

We do not regard this comment as any the less telling because it occurred in the course of an explanation of the effect of the amendment on taxes on out-of-State national banks, since the undeniable over-all design of the amendments to the then existing Federal legislative scheme was to give States expanded power to subject national banks headquartered within their borders to all nondiscriminatory taxes rather than to a limited "laundry list" (115 Congressional Record 19912 [1969]). There is consequently no reason to believe that the express equating of "occupancy of real property" with "tangible personal property" did not apply.

Accordingly, we conclude that Public Law No. 91-156 did not immunize petitioners from liability for New York City commercial rent taxes during the years at issue. It follows that the judgments from which the appeals are taken should each be affirmed.

JONES, J. (dissenting). I would reverse the judgment of the Appellate Division in each case and annul the determination of the City Finance Administration imposing the New York City commercial rent and occupancy tax on petitioners national banks for the period prior to January 1, 1973.

In 1969 the Congress amended section 5219 of the Revised Statutes of the United States (US Code, tit 12,

§ 548) specifically to authorize State taxation of national banks in prescribed ways. Broad authorization was granted on a permanent basis beginning in 1972 (later deferred to 1973); interim provisions were prescribed with respect to the transitional period prior to 1973. We are here concerned only with such interim provisions.

I read section 3 (subd [a], par [2]) of the amendatory Federal statute (US Public Law No. 91-156), authorizing State taxation in the period prior to January 1, 1973 in the event of "affirmative action of the State legislature", as requiring a conscious and manifested determination on the part of the State legislature to subject national banks to the imposition of the permitted State taxes. The record of the deliberations of the Senate Committee on Banking and Currency supports this conclusion: "The committee realizes that for many years the tax structure within the States has been drawn in recognition of the different positions of State and National banks with respect to liability for State taxes. In effect, the States have adopted many different formulas in an attempt to equalize the total tax burden between State and National banks. If by congressional action banks were automatically subject to taxes which they had not been previously paying, in addition to the taxes which they are now paying, the effect may be to destroy the degree of equality that the State legislature, by conscious effort, attempted to achieve. Accordingly, the committee believes it wise to require *positive State legislative action* as a prerequite to the imposition on banks of the additional taxes authorized by the bill." (Sen Rep 91-530, 91st Cong, 1st Sess 6 [1969]; 1969 US Code, Congressional and Administrative News, vol 2, 1594, 1598-1599; emphasis supplied.) (See, also, the final conference report

of the managers on the part of the House of Representatives: HR Rep No. 91-728, 91st Cong, 1st Sess 5 [1969]; 1969 US Code, Congressional and Administrative News, vol 2, pp 1602-1603.)

The enactment of chapter 166 of the Laws of 1970 by our State Legislature constituted no such "affirmative action". It served only to increase the rates of the pre-existing tax. Nothing in the record before us reveals that the City of New York, the sole beneficiary of the increased rates, in seeking the amendment of the State Legislature in enacting it had extension of the tax to national banks even remotely in mind. The Governor's message of necessity on which enactment of chapter 166 was predicated makes no reference to taxation of national banks. Notwithstanding particularized postargument requests to the city therefor, no statement of estimated revenue to be realized from the amendment or other document submitted by the city in support of the enactment of chapter 166 has been furnished in which any reference is made to estimated income to be derived from taxes to be paid by national banks or to any other aspect of taxation of national banks. No shred of contemporaneous proof suggests that either the city administration or the State Legislature was even aware that section 5219 had been amended or that thereby the Congress had granted authority for expanded State taxation of national banks.

In such circumstances I cannot conclude that legislative action, taken wholly without reference to the Federal statute, constitutes the "affirmative action" contemplated by the Congress when it authorized additional State taxation of national banks. Nor can I conclude that the enactment of the 1970 increase in rates may be so construed as to

support the city's alternative contention that the "saving provision" of the Federal statute had no application inasmuch as the taxes in question were not imposed under the authority of pre-existing State legislation but rather were imposed under the authority of the 1970 amendment only.

I must also disagree with respect to the second ground proffered by the majority to sustain imposition of the New York City commercial rent and occupancy tax on petitioners, viz., application of subdivision (b) of section 3 of Public Law No. 91-156. The decision in *Ampco Printing-Advertisers' Offset Corp. v City of New York* (14 NY2d 11, app dsmd 379 US 5), heavily relied on, is by no means conclusive that in the present context the commercial rent tax is a tax on tangible personal property. What was necessarily decided by the court in *Ampco*, which dealt with the validity of the commercial rent and occupancy tax under our State Constitution, was that the tax there was not a prohibited ad valorem tax on intangible personal property. Even if that case be read, however, as characterizing the tax for State constitutional purposes as a tax on tangible personal property—which was not necessarily there determined—such a description could not and should not be binding for present purposes or classification within the contemplation of Congressional statutes. Nothing suggests that the opinion in *Ampco* was written with a Federal statute like Public Law No. 91-156 in mind. There was not then posed or considered the question now before this court —how the commercial rent and occupancy tax is to be regarded for purposes of Federal, not New York, law authorizing local taxation of national banks. Similarly *Matter of Fort Hamilton Manor* v *Boyland* (4 NY2d 192) and

Matter of Grumman Aircraft Eng. Corp. v *Board of Assessors of Town of Riverhead* (2 NY2d 500, cert den 355 US 814) arose in a totally distinguishable context. Finally, even the City of New York itself has never asserted that authorization for the present tax is to be found in subdivision (b).

Chief Judge BREITEL and Judges GABRIELLI and COOKE concur with Judge FUCHSBERG; Judge JONES dissents and votes to reverse in a separate opinion in which Judges JASEN and WACHTLER concur.

In each case: Judgment affirmed, with costs.

APPENDIX C

Order of the Court of Appeals Denying Reargument

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-second day of February A.D. 1978.

Present—Hon. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 126

CITIBANK, N.A. (FORMERLY KNOWN AS FIRST NATIONAL CITY BANK),
Appellant,

vs.

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
Respondent,

To review &c.

THE CHASE MANHATTAN BANK, N.A.,
Appellant,

vs.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK, ET AL.,
Respondents,

For a Judgment &c.

A motion for reargument in the above cause having heretofore been made upon the part of the appellants herein and

Order of the Court of Appeals Denying Reargument

papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa
Clerk of the Court

APPENDIX D

Decision of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 6, 1976.

Present—Hon. THEODORE R. KUPFERMAN, *Justice Presiding,*
FRANCIS T. MURPHY, JR.,
VINCENT A. LUPIANO,
SAMUEL J. SILVERMAN,
EMILIO NUNEZ, *Justices.*

3691

CITIBANK, N.A. (FORMERLY KNOWN AS FIRST NATIONAL CITY BANK),
Petitioner,

—against—

THE CITY OF NEW YORK FINANCE ADMINISTRATION,
Respondent,

To review, pursuant to Article 78 CPLR, a Final Determination, etc.

3692

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

—against—

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK AND IVAN E. IRIZZARY AS FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,
Respondents,

For a Judgment under Article 78 of the Civil Practice Law and Rules.

Decision of the Appellate Division

Determinations of respondents, dated December 8, 1975 and March 29, 1976, respectively, confirmed and the petitions dismissed. Respondents shall recover of petitioners $60 costs and disbursements of this proceeding. Concur—Kupferman, J. P., Murphy, Lupiano and Nunez, JJ., Silverman, J., dissents in the following memorandum: In my view, as a matter of law the amendatory legislation of 1970 remained "state legislation in effect prior to the enactment" of the 1969 amendment of section 5219 of the United States Revised Statutes (US Code, tit 12, § 548), and did not constitute that "affirmative action of the State Legislature after the enactment of this Act," required by Public Law No. 91-156 (83 US Stat 434), as amended by Public Law No. 92-213 (85 US Stat 775). Accordingly, I would annul the determination of the City Finance Administration imposing the New York City commercial rent and occupancy tax on petitioners national banks for the period prior to January 1, 1973.

APPENDIX E

Final Determination—The Chase Manhattan Bank, N.A.

LETTERHEAD OF
THE CITY OF NEW YORK
FINANCE ADMINISTRATION
OFFICE OF LEGAL AFFAIRS
HEARING BUREAU
225 Broadway, New York, N.Y. 10007

FINAL DETERMINATION

DATE March 29, 1976

IN RE: Commercial Rent or Occupancy Tax

AUDIT NO. UC-41221

REG. NO. M-500329-8 1-500329-6

EMP. IDENT. NO. 13 | 2633612

NAME The Chase Manhattan Bank, N.A.
ADDRESS One Chase Manhattan Plaza
New York, New York 10015

The Chase Manhattan Bank, N.A.
One Chase Manhattan Plaza
New York, New York 10015

Notice is hereby given, pursuant to the Administrative Code of the City of New York, that there is due and payable to the City of New York a Commercial Rent Tax

Final Determination—The Chase Manhattan Bank, N.A.

Deficiency in the amounts and for the periods set forth below.

	Summary of Tax Deficiency		
Periods	Principal	Int.-Pen	Total
6/1/69-5/31/70	$ –0–	$ –0–	$ –0–
6/1/70-5/31/71	1,054,573.74	494,331.44	1,548,905.18
6/1/71-5/31/72	1,123,357.94	425,469.82	1,548,827.76
		(4/20/76)	
Total Amount Due	$2,177,931.68	$919,801.26	$3,097,732.94

This determination is final and irrevocable. Additional interest accrues at the rate of 1% per month unless payment is received within ten (10) days from the date hereof. Failure to remit promptly will cause the Finance Administration of the City of New York to issue and docket a warrant as provided for by law.

MAIL YOUR REMITTANCE TO THE OFFICE OF THE CITY COLLECTOR AT 79 WORTH STREET, NEW YORK, N. Y. In order to obtain proper credit for payment, please attach thereto a copy of this notice.

IN REPLY REFER TO: HEARING BUREAU—17th Floor.

Very truly yours,

Finance Administrator

by: /s/ LAWRENCE M. GETELMAN
Acting Chief, Hearing Bureau

cc: J. PAUL MCGRATH, ESQ.
Dewey, Ballantine, Bushby,
Palmer & Wood
140 Broadway
New York, New York 10005

Findings of Fact, Conclusions of Law and Decision—The Chase Manhattan Bank, N.A.

The Chase Manhattan Bank, N.A.
One Chase Manhattan Plaza
New York, New York 10015

Audit No. UC-41221
Registration No. M-500329-8
1-500329-6
Employer Ident. No.
13-2633-612

FINDINGS

Facts:

1. The Chase Manhattan Bank, N.A., the taxpayer herein, is and was during the audit period of June 1, 1969 to May 31, 1972 a national banking association.

2. Taxpayer filed annual Commercial Rent or Occupancy Tax returns for each of the tax years within the audit period on June 19, 1970, June 21, 1971 and June 20, 1972, respectively, indicating the amount of base rent subject to tax but reporting no tax due on the grounds that it was exempt from such tax.

3. Upon audit by the City, a Notice of Determination dated July 10, 1973 was issued showing a deficiency in Commercial Rent Tax for the audit period as follows:

Period: 6/1/69—5/31/72

Principal Tax	$2,659,345.33
Interest to 7/20/73	530,603.17
Total Tax Due	$3,189,948.50

4. Hearing was requested and scheduled. Formal Hearing was held and concluded.

5. At the formal hearing, taxpayer contended that even if it were liable for the Commercial Rent or Occupancy Tax during the audit period, the assessment for the period from June 1, 1969 to May 31, 1970 was barred by the Statute of Limitations, pursuant to Section L46-17.0 (b) of the Administrative Code of the City of New York, since the tax return for that period was filed on June 19, 1970 and the Notice of Determination was not issued until July 10, 1973.

6. Section L46-17.0 (b) of the Administrative Code of the City of New York provides in part that ". . . except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the final return for the tax year to which the assessment relates. . . ."

7. The attorney for the taxpayer conceded the accuracy of the figures and the mathematics used by the City's auditor in computing the total Commercial Rent or Occupancy Tax deficiency herein.

8. The taxpayer failed to show that it was not liable for Commercial Rent or Occupancy Tax as a tenant that occupied and used premises within the City of New York, for which it paid rent, for the purpose of carrying on its business and its commercial activities, from June 1, 1970 to May 31, 1972.

Conclusion:

1. The taxpayer, The Chase Manhattan Bank, N.A., as a tenant, occupied and used various premises within the City of New York for the purpose of carrying on its business and its commercial activities.

2. The Chase Manhattan Bank, N.A., the taxpayer herein, is subject to the Commercial Rent or Occupancy Tax pursuant to Title L of Chapter 46 of the Administrative Code of the City of New York, as authorized by the legislature of the State of New York.

3. Pursuant to Section L46-17.0 (b) of the Administrative Code of the City of New York the Commercial Rent or Occupancy Tax for the period from June 1, 1969 to May 31, 1970 is barred by the Statute of Limitations and, therefore, should be abated as to principal and interest thereon.

Decision:

1. The Commercial Rent or Occupancy Tax determination should be affirmed as follows:

Period: June 1, 1970 to May 31, 1972

Principal	$2,177,931.68
Interest to 4/20/76	919,801.26
Total Tax Due	$3,097,732.94

2. The Commercial Rent or Occupancy Tax determination should be abated for the period from June 1, 1969 to May 31, 1970 in the principal amount of $481,413.65 and the interest thereon.

Final Determination—Citibank, N.A.

LETTERHEAD OF

THE CITY OF NEW YORK
FINANCE ADMINISTRATION
OFFICE OF LEGAL AFFAIRS
HEARING BUREAU
225 Broadway, New York, N. Y. 10007

FINAL DETERMINATION

DATE December 8, 1975

IN RE: Commercial Rent or Occupancy Tax

AUDIT No. UE-1090

REG. No. 1-666743; M-666743-0

EMP. IDENT. No. 13 | 5266470

NAME First National City Bank

ADDRESS 399 Park Avenue
New York, New York 10022

First National City Bank
399 Park Avenue
New York, New York 10022

Notice is hereby given, pursuant to the Administrative Code of the City of New York, that there is due and payable to the City of New York a Commercial Rent or Occupancy Tax Deficiency in the amounts and for the periods set forth below.

	Summary of Tax Deficiency		
Periods	Principal	Int.-Pen.	Total
6/1/69-5/31/70	$ –0–	$ –0–	$ –0–
6/1/70-5/31/71	939,070.33	362,715.91	1,301,786.24
6/1/71-5/31/72	1,080,905.38	320,218.22	1,401,123.60
See attached schedule for locations (5/20/75)			
Total Amount Due	$2,019,975.71	$682,934.13	$2,702,909.84

This determination is final and irrevocable. Additional interest accrues at the rate of 1% per month unless payment is received within ten (10) days from the date hereof. Failure to remit promptly will cause the Finance Administration of the City of New York to issue and docket a warrant as provided for by law.

MAIL YOUR REMITTANCE TO THE OFFICE OF THE CITY COLLECTOR AT 79 WORTH STREET, NEW YORK, N. Y. In order to obtain proper credit for payment, please attach thereto a copy of this notice.

IN REPLY REFER TO: HEARING BUREAU—17TH FLOOR

Very truly yours,

Finance Administrator

by: /s/ LAWRENCE M. GETELMAN
Acting Chief, Hearing Bureau

cc: Shearman & Sterling, Esqs.
53 Wall Street
New York, New York 10005
Att: EDWARD J. BOYLE, ESQ.

Findings of Fact, Conclusions of Law and Decision— Citibank, N.A.

First National City Bank
399 Park Avenue
New York, New York 10022

Audit Number: UE-1090

Registration Number: 1-666743-0
M-666743-0

Employer's Identification Number: 13-5266470

FINDINGS

Facts:

1. First National City Bank, the taxpayer herein, is a national banking association, which was assessed by the City of New York, for a Commercial Rent or Occupancy Tax deficiency, pursuant to a notice of determination dated February 1, 1973, as follows:

Period: 6/1/69-5/31/72

Principal Tax	$2,484,247.11
Interest to 11/20/72	345,087.86
Total Tax Due	$2,829,334.97

2. Pursuant to a letter, received by the Finance Administration on February 23, 1973, the taxpayer applied for a hearing in this matter.

3. A formal hearing was held to a conclusion on April 28, 1975.

4. At the formal hearing, the attorney for the taxpayer conceded the accuracy of the figures and the mathematics used by the City's auditor in computing the total Commercial Rent or Occupancy Tax deficiency herein.

5. The taxpayer failed to show that it was not liable for commercial rent or occupancy tax as a tenant, that occupied and used premises within the City of New York, for which it paid rent, for the purpose of carrying on its business and its commercial activities, for June 1, 1970 to May 31, 1972.

Conclusion:

1. The taxpayer, First National City Bank, as a tenant, occupied and used various premises within the City of New York for the purpose of carrying on its business and its commercial activities.

2. First National City Bank, the taxpayer herein, is subject to the Commercial Rent or Occupancy Tax pursuant to Title L of Chapter 46 of the Administrative Code of the City of New York, as authorized by the legislature of the State of New York.

3. Pursuant to Federal Law, the Commercial Rent or Occupancy Tax for the period June 1, 1969 to May 31, 1970 should be abated as to principal and interest thereon.

Decision:

1. The Commercial Rent or Occupancy Tax Determination should be affirmed as follows:

Period: June 1, 1970 to May 31, 1972

Principal	$2,019,975.71
Interest to 5/20/75	682,934.13
Total Tax Due	$2,702,909.84

2. The Commercial Rent or Occupany Tax determination should be abated for the period from June 1, 1969 to May 31, 1970 in the principal amount of $464,271.40 and the interest thereon.

Section 5219 of the Revised Statutes of the United States, 12 U.S.C. §548 (1957)

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or

Section 5219 of the Revised Statutes of the United States, 12 U.S.C. §548 (1957)

according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section.

APPENDIX G

Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434

AN ACT

To clarify the liability of national banks for certain taxes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

§ 1. Temporary amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended by adding at the end thereof the following:

"5. (a) In addition to the other methods of taxation authorized by the foregoing provisions of this section and subject to the limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

"(b) Except as otherwise herein provided, the legislature of each State may impose, and may authorize any political subdivision thereof to impose, the following taxes on a national bank not having its principal office located within the jurisdiction of such State, if such taxes are imposed generally throughout such jurisdiction on a nondiscriminatory basis:

"(1) Sales taxes and use taxes complementary thereto upon purchases, sales, and use within such jurisdiction.

"(2) Taxes on real property or on the occupancy of real property located within such jurisdiction.

"(3) Taxes (including documentary stamp taxes) on the execution, delivery, or recordation of documents within such jurisdiction.

"(4) Taxes on tangible personal property (not including cash or currency) located within such jurisdiction.

"(5) License, registration, transfer, excise, or other fees or taxes imposed on the ownership, use, or transfer of tangible personal property located within such jurisdiction.

"(c) No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969.

"(d) As used in this paragraph 5, the term 'State' means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam."

(b) The amendment made by subsection (a) of this section shall be effective from the date of enactment of this Act until the effective date of the amendment made by section 2(a) of this Act.

§ 2. Permanent amendment of section 5219, Revised Statutes

(a) Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended to read:

"SEC. 5219. For the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located."

(b) The amendment made by subsection (a) becomes effective on January 1, 1972.

§ 3. Saving provision

(a) Except as provided in subsection (b) of this section, prior to January 1, 1972, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act.

(b) The prohibition of subsection (a) of this section does not apply to

(1) any sales tax or use tax complementary thereto,

(2) any tax (including a documentary stamp tax) on the execution, delivery, or recordation of documents, or

Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434

(3) any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property,

imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof.

§ 4. Study by Board of Governors of the Federal Reserve System

(a) The Board of Governors of the Federal Reserve System (hereinafter referred to as the "Board") shall make a study to determine the probable impact on the banking systems and other economic effects of the changes in existing law to be made by section 2 of this Act governing income taxes, intangible property taxes, so-called doing business taxes, and any other similar taxes which are or may be imposed on banks. In conducting the study the Board shall consult with the Secretary of the Treasury and appropriate State banking and taxing authorities.

(b) The Board shall make a report of the results of its study to the Congress not later than December 31, 1970. The report shall include the Board's recommendations as to what additional Federal legislation, if any, may be needed to reconcile the promotion of the economic efficiency of the banking systems of the Nation with the achievement of effectiveness and local autonomy in meeting the fiscal needs of the States and their political subdivisions.

Act of December 22, 1971, Pub. L. No. 92-213, §4(a), 85 Stat. 775

EXTENSION OF DATES APPLICABLE TO CERTAIN PROVISIONS OF LAW RELATING TO THE TAXATION OF NATIONAL BANKS

SEC. 4. (a) The Act entitled "An Act to clarify the liability of national banks for certain taxes", approved December 24, 1969 (83 Stat. 434), is amended by striking out "1972" in sections 2(b) and 3(a) and inserting in lieu thereof "1973".

• • •

APPENDIX H

Laws of New York, 1963, ch. 257

An Act to enable any city having a population of one million or more to impose and collect taxes on rent or occupancy.

Became a law April 3, 1963, with the approval of the Governor.

Effective as shown in § 2.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. (1) Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as the legislature has or would have the power and authority to impose on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use or occupancy of such premises, but not to exceed two and one-half percentum of such rent where the rent is not in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would not exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year and not to exceed five percentum of such rent where the rent is in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year.

(2) Such tax may be collected and administered by the director of finance or other fiscal officers of such city by such means and in such manner as other taxes which are now collected and administered by such officers in accordance with the charter or administrative code of any such city or as otherwise may be provided by such local law.

(3) When used in this act the following terms and expressions shall mean and include:

a. "Person." An individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, or any other person acting in a fiduciary capacity, whether appointed by a court or otherwise, and any combination of individuals.

b. "Premises." Any real property or part thereof, and any structure thereon or space therein.

c. "Rent." The amount, whether received in money or otherwise, paid by any lessee, sublessee, licensee or concessionaire for the right or permission to occupy the premises, including the amount so paid even though based on a share of profits.

(4) Such local laws may provide that any tax imposed shall be paid by the person liable therefor to the owner of the premises occupied or to the person entitled to be paid the rent for the premises occupied for and on account of the city imposing the tax and that such owner or person entitled to be paid the rent shall be liable for the collection and payment of the tax; and that such owner or person entitled to be paid the rent shall have the same right in respect to collecting the tax from the person occupying the premises, or in respect to non-payment of the tax by the person occupying the premises, as if the tax were a part of the rent and

payable at the same time as the rent; provided, however, that the director of finance or other fiscal officers of such city, specified in such local law, shall be joined as a party in any action or proceeding brought to collect the tax by the owner or by the person entitled to be paid the rent.

(5) Such local laws may provide that the lower rate or rates of tax provided therein for rents not in excess of twenty-five hundred dollars shall be applicable to rents in excess of that amount and may provide for different rates of tax, not in excess of those specified in subdivision one hereof, for rents in excess of twenty-five hundred dollars or for rents not in excess of that amount; and may provide for exclusions or exemptions from such tax other than those specified in this act.

(6) Such local laws may provide for the filing of returns and the payment of the tax on a monthly basis or on the basis of any longer or shorter period of time.

(7) This act shall not authorize the imposition of such tax upon the following:

a. The state of New York, or any public corporation (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada), improvement district or other political subdivision of the state;

b. The United States of America, insofar as it is immune from taxation;

c. The United Nations or other world-wide international organizations of which the United States of America is a member; and

d. Any corporation, or association, or trust, or community chest, fund or foundation, organized and operated

exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include an organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph.

(8) Any final determination of the amount of any tax payable hereunder shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if application therefor is made to the supreme court within thirty days after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice act shall not be instituted unless (a) the amount of any tax sought to be reviewed, with such interest and penalties thereon as may be provided for by local law or regulation, shall be first deposited and there is filed an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding or (b) at the option of the petitioner such undertaking may be in a sum sufficient to cover the taxes, interest and penalties

stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the petitioner shall not be required to pay such taxes, interest or penalties as a condition precedent to the application.

(9) Where any tax imposed hereunder shall have been erroneously, illegally or unconstitutionally collected and application for the refund thereof duly made to the proper fiscal officer or officers, and such officer or officers shall have made a determination denying such refund, such determination shall be reviewable by a proceeding under article seventy-eight of the civil practice act, provided, however, that such proceeding is instituted within thirty days after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

(10) Except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, however, that where no return has been filed as provided by law the tax may be assessed at any time.

(11) Revenues resulting from the imposition of tax authorized by this act shall be paid into the treasury of any such city and shall be credited to and deposited in the general fund of any such city.

(12) If any provision of this act or the application thereof to any person or circumstance shall be held invalid, the remainder of this act and the application of such provision to other persons or circumstances shall not be affected thereby.

§ 2. This act shall take effect June first, nineteen hundred sixty-three, except that local laws may be adopted or amended pursuant to this act before such date to take effect on or after June first, nineteen hundred sixty-three.

Laws of New York, 1970, ch. 166

An Act to amend chapter two hundred fifty-seven of the laws of nineteen hundred sixty-three, entitled "An Act to enable any city having a population of one million or more to impose and collect taxes on rent or occupancy," in relation to restructuring the rates of such taxes and to increase the rate of taxes in certain instances and repealing a portion in relation thereto.

Approved and effective April 22, 1970.

Passed on message of necessity. See Const. art. IX, § 2(b) (2), and McKinney's Legislative Law § 44.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision one of section one of chapter two hundred fifty-seven of the laws of nineteen hundred sixty-three, entitled "An act to enable any city having a population of one million or more to impose and collect taxes on rent or occupancy," is hereby amended to read as follows:

(1) Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as the legislature has or would have the power and authority to impose on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use [or] occupancy of such premises, but, for periods embraced in the period beginning June first, nineteen hundred sixty-three and ending May thirty-first, nineteen hundred seventy, not to exceed two and

Changes or additions in text are indicated by underline, deletions by strikeouts.

one-half percentum of such rent where the rent is not in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would not exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year and not to exceed five percentum of such rent where the rent is in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year. For periods beginning after May thirty-first, nineteen hundred seventy such tax shall be imposed at the rates shown in the following table. Where the rent is for a period of less than one year, the rate shall be determined by assuming that the rent is on an equivalent basis for the entire year.

Where the annual rent is:	But not more than:	The rate shall be:
0	$ 2499	2½% of the rent
$ 2500 or over	$ 4999	5% of the rent
$ 5000 or over	$ 7999	6¼% of the rent
$ 8000 or over	$10999	7% of the rent
$11000 and over		7½% of the rent

§ 2. Subdivision five of section one of such chapter is hereby repealed.

§ 3. This act shall take effect immediately.

(42373)

Supreme Court, U. S.
FILED
JUN 20 1978
DAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK and THE FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENTS IN OPPOSITION

ALLEN G. SCHWARTZ
Corporation Counsel of
The City of New York
Attorney for Respondents
Municipal Building
New York, New York 10007
(212) 566-3327

SAMUEL J. WARMS,
of Counsel.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Statement of the Case	2
Questions Presented	2
Constitutional and Statutory Background	3
ARGUMENT:	
I—The statute involved is no longer in effect and the case does not present a problem of wide applicability	4
II—The enactment of chapter 166 of the laws of 1970 by the state legislature constituted "affirmative action of the state legislature" within the meaning of paragraph 2 of subsection (a) of section 3 of Public Law 91-156, 83 Stat. 434, which required authorization for the tax by that affirmative action	6
III—Should this Court reverse the judgment below we reserve the right to request a remand rather than an outright reversal	7
Conclusion	8

TABLE OF CASES

	PAGE
Agricultural Bank v. *Tax Comm'n.*, 392 U.S. 339 (1968)	3
Dickinson v. *First National Bank of Homestead*, 393 U.S. 409 (1969)	3
Greyhound Lines v. *Mealey*, 334 U.S. 653 (1948)	8
N.A.A.C.P. v. *Button*, 371 U.S. 415 (1963)	8
Rice v. *Sioux City Cemetery*, 349 U.S. 70, 74, 79 (1955)	5
Spector Motor Co. v. *McLaughlin*, 323 U.S. 101 (1944)	8

STATUTES

Act of December 24, 1969, Pub.L. No. 91-156, 83 Stat. 434, *as amended by* Act of December 22, 1971, Pub. L. No. 92-213, § 4, 85 Stat. 775 ..... 2, 3, 4, 5

Laws of New York, 1963, ch.257, *as amended by* Laws of New York, 1970, ch.166, N.Y. Unconsol. Laws § 9447 (McKinney 1974) 2, 4, 6, 7

Laws of New York, 1977, ch. 708 7

Section 5219 of the Revised Statutes of the United States, 12 U.S.C. § 548 (1957) 3, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK and THE FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinions below are accurately set forth in the petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Statutes Involved

The statutes involved are adequately set forth in the petition and its appendices F, G and H.

Statement of the Case

The statement of the case in the petition is for the most part correct. There are, however, a few minor inaccuracies which we set forth at this point.

At page 5 of the petition, it is stated that "[n]o such affirmative action had occurred * * *". This, of course, is a legal conclusion contrary to what the Court below found.

On the same page, petitioners state that the Court below held the tax in question to be lawfully imposed on national banks for the period prior to January 1, 1973. Actually, that Court validated the tax only for periods subsequent to May 31, 1970.

Questions Presented

Petitioners' statements of the subsidiary questions, while adequate for an understanding of the case, are slightly incomplete. We would put the question involved in the following different form:

(1) Whether the enactment of chapter 166 of the New York Laws of 1970 constituted the "affirmative action of the State legislature" required by § 3 of Pub. L. No. 91-156, the saving provision of that law, when there was no specific or express mention of national banks in that chapter.

(2) We do not brief the question of whether the tax involved is one on tangible personal property because

although the Court below denominated this issue as "at least equally dispositive" (Pet. A., B-6) it is our feeling that it is a secondary issue none the less.

Constitutional and Statutory Background

On June 17, 1968 this Court handed down its opinion in *Agricultural Bank* v. *Tax Comm'n.*, 392 U.S. 339 (1968). That case held that a state could not impose taxes on national banks other than those authorized specifically by United States Revised Statutes § 5219 (U.S.C. § 548).

After this Court's decisions in the *Agricultural Bank* case, *supra*, and in the case of *Dickinson* v. *First National Bank of Homestead*, 393 U.S. 409 (1969), Congress enacted P.L. 91-156, 83 Stat. 434, to amend § 5219 of the Revised Statutes effective December 24, 1969. It is this law as amended by P.L. 92-213, § 4, 85 Stat. 775, with which we are dealing. The Congressional legislation, among other things, permitted certain non-discriminatory taxes to be laid by the states on national banks and in its § 2, permanently amended Revised Statutes § 5219 (12 U.S.C. § 548) effective January 1, 1973, to permit taxation of national banks as if they were organized and existed under the laws of the state or jurisdiction within which the bank's principal office was located. However, during the period prior to January 1, 1973 the federal legislation prohibited (with exceptions not here relevant) the imposition of a tax on a bank:

> "by or under the authority of any State legislation *in effect prior to the enactment of this act* unless
>
> • • • •
>
> 2. The imposition of the tax is authorized by *affirmative action of the state legislature* after enactment of this act." (Italics supplied.)

On April 22, 1970, approximately four months after the enactment of the federal legislation (December 24, 1969), chapter 166 of the laws of New York for that year became effective. Its enactment by the New York State Legislature authorized specifically the imposition of commercial occupancy taxes for the period beginning after May 31, 1970 at higher rates than those previously in effect. It did not expressly or explicitly state that national banks would be subject to the taxes authorized. However, it incorporated and reenacted the language of the section of the original enabling act, chapter 257 of the laws of 1963, which granted the power to impose an occupancy tax. That act, set forth in subdivision 7 of its section 1, four categories of exemption which did not include national banking associations. Indeed, it exempted "[t]he United States of America, only insofar as it is immune from taxation".

Thus, on its face, the original enabling act purported to authorize a tax on national banks. The action of the legislature in 1970 continued and reiterated the enabling legislation without express or explicit mention of national banks, nor did the local law imposing the tax, No. 20 of 1970 make any explicit or express mention of national banks. Both pieces of legislation left undisturbed similar exemption provisions that contained no exemption of national banks.

ARGUMENT

(I)

The statute involved is no longer in effect and the case does not present a problem of wide applicability.

Although the statute we are dealing with (Section 3 of Pub. L. No. 91-156, as amended by Pub. L. 92-213) is still on the books, its vitality and force came to an end on

December 31, 1972. As a result, it is in the same class as is a repealed statute.

It is unlikely in the extreme that another case involving the unique background of this case will arise. Certainly, there is no hint of similar litigation in the annotations to 12 U.S.C.A. § 548.

Petitioners' speculation (Pet. p. 7) about the 13 other national banks with offices in New York City "whose liability for the Commercial Rent Tax may still be open" has no foundation in fact. Indeed, all that petitioners say is that the liability of those banks may still be open. When petitioners apply this kind of reasoning to the 4722 national banks in the country, they really stretch one's credulity.

In *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74, 79 (1955), this Court, having granted a writ of certiorari, and heard arguments on the case, dismissed the petition when a new state statute had the effect of insuring that the question involved would not recur.

The provision of the statute involved in this case (§ 3 of Pub. L. No. 91-156) lost its force on January 1, 1973 when section 2 of Pub. L. No. 91-156 took effect (A.G.-3, Pet.).

Even though the granting or denying of an application for a writ does not necessarily depend upon the court's action in similar cases, the fact is that the present case will add very little to the fabric of the law. The saving provision of Pub. L. 91-156, section 3, as amended by Pub. L. 92-213, had a life of a little over three years.

(II)

The enactment of chapter 166 of the laws of 1970 by the state legislature, constituted "affirmative action of the state legislature" within the meaning of paragraph (2) of subsection (a) of section 3 of Public Law 91-156, 83 Stat. 434, which required authorization for the tax by that affirmative action.

The taxpayers have confused the word "affirmative" with the words "explicit", "express", "specific" or "conscious". The word "affirmative" means none of these four things. Indeed, the legislative intent is expressed somewhat ambiguously. Neither did the federal statute mean "manifested in an unmistakable manner"; nor does it mean "clear on the face of the legislation". And it does not require that the action of the legislature be not only "affirmative" but also "positive", although that word has approximately the same meaning as "affirmative". The word "affirmative", according to the dictionary, means giving affirmation or assent, and not negative. Webster, New International Dictionary 2d Ed., p. 43.

The fact that the law brought about meaningful increases in the rate of tax, in the words of the Court below, makes "it * * * difficult to perceive how they (legislative decisions) can be regarded as anything but permeated with 'action' ".

Since the statute which authorized the local law involved here, on its face clearly encompassed national banks within its coverage, there was no reason at the time to reenact the authorizing section of the earlier 1963 enabling act in any other way, in order to bring national banks within the ambit of its language. They were already there. There was no pre-existing exemption of national banks to repeal. Congress had done that. All that was required was affirmative action authorizing imposition of the tax. The 1970 legislation was an affirmative act. It

was unnecessary to insert a specific provision calling for the tax to apply to national banks.

When the legislature made the change by enacting chapter 166 of the Laws of 1970, it purported to amend the entire text of subdivision (1) of section 1 of the original enabling act. The new material in the law related to tax periods beginning after May 31, 1970 and authorized the imposition of tax for those periods, denominating them as "such taxes", an obvious reference to the more fully described tax in the language which was reenacted. It is clear that for the tax period in question, a new tax at the higher rate was authorized and national banks were not excluded or exempted from that tax.

Petitioners state several times in their petition that chapter 166 of the Laws of 1970 effected a mere rate change (Pet. 11 and 12). They overlook the fact that section 2 of chapter 166 repealed another provision in the act (H-8).*

(III)

Should this Court reverse the judgment below we reserve the right to request a remand rather than an outright reversal.

In the Courts below we argued that the "affirmative action of the State legislature" was not required to validate the tax in issue. This argument is bottomed on the rule of statutory construction to which the Court of Appeals alluded in its opinion (Pets', A., B-5, B-6)—a rule that views a statutory amendment to an earlier statute as a republication of the statute in the manner in which a codicil republishes a will. When the Court of Appeals found that the 1970 law, which republished the 1963 law,

---

* The repealed subdivision was restored in part by New York Laws of 1977, chapter 708.

constituted affirmative action, there was no need to pay any heed to the other argument. We mention this here so that, in the event of a reversal by this Court, it will remand the matter for resolution of this point, which is a matter of state law, i.e., the effect of the republication of a law when amending it. See *Spector Motor Co.* v. *McLaughlin,* 323 U.S. 101 (1944), *Greyhound Lines* v. *Mealey,* 334 U.S. 653 (1948), *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: June 15, 1978.

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel of
The City of New York
Attorney for Respondents
Municipal Building
New York, New York 10007
(212) 566-3327

SAMUEL J. WARMS,
of Counsel.

Supreme Court, U. S.
FILED
SEP 11 1978
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK AND THE FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENTS' SUPPLEMENTAL BRIEF

ALLEN G. SCHWARTZ,
Corporation Counsel,
Attorney for Respondents,
Municipal Building,
New York, N.Y. 10007.
(212) 566-3327

SAMUEL J. WARMS,
of Counsel.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1659

THE CHASE MANHATTAN BANK, N.A., and CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK AND THE FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

ARGUMENT

This supplemental brief relates to material not involved, and hence not available at the time of the filing of our brief in opposition. That material is the citation by petitioners in their reply memorandum, of Bigelow v. Virginia, 421 U.S. 809 (1975), and the naming of two New England banks whose liability for the Commercial Rent tax is stated to be "still open".

Bigelow v. Virginia, supra, is erroneously cited in petitioners' reply memorandum as a case in which this Court granted certiorari after the repeal or amendment of the statute involved. This statement is erroneous. The Bigelow case was an appeal, as of right, and involved no granting of a writ of certiorari.

Allusion to the alleged disputes between the City and the two New England banks is unfortunate, for we cannot disclose what we know about these two banks because of a very strong secrecy provision in the taxing law, §L46-16.0 of the Administrative Code of the City of New York. Understandably, the affairs of these banks appear nowhere in the record. For, had petitioners sough to air those affairs at the administrative hearin

such evidence would have been irrelevant. If the City had produced any file relating to these banks the taxing officials and counsel would have been guilty of a violation of the secrecy provision.

See Taxation & Fin v. Dept of Law, 44 N Y 2d 575, 378 NE 2d 110 (1978).

We can state, as a result of a somewhat perfunctuory search, that there appears to be no file in the Department of Finance's records relating to New England Merchants National Bank. There is a file for The First National Bank of Boston.

We are unable to tell the Court anything of that bank because we are prevented from outlining the details relating to it by the provision in the Commerical Rent or Occupancy Tax Law (Administrative Code of the City of New York, §L46-16.0) which forbids our allusion to a given taxpayer's affairs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: September 7, 1978

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel,
Attorney for Respondents.

SAMUEL J. WARMS,
of Counsel.

Supreme Court, U.S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE STATE OF
NEW YORK

RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

ALLEN G. SCHWARTZ
Corporation Counsel
100 Church Street
New York, N.Y. 10007
(212) 566-3327

SAMUEL J. WARMS,
MAURICE RAVAGE,

of Counsel.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERIORARI TO
THE COURT OF APPEALS OF THE STATE OF
NEW YORK

RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

This brief relates to material not available or involved at the time of the filing of our other briefs in opposition.

It is occasioned by the brief submitted by the Solicitor General at the invitation of this Court.

That brief embraces the views of the petitioners in these cases and it also suggests that the cases be disposed of by an unconditional summary reversal. In our brief in opposition we stated our position very briefly because we thought and still think that the petition for a writ of certiorari should be denied or if granted, would be the subject of oral argument. We also set forth in that brief, a short summary of our position on the merits. We now feel that we must expand one of our points so that a summary reversal is forestalled.

In the Court of Appeals our first and longest point was to the effect that the law in question, New York Laws of 1970, Ch. 166,

was not in effect prior to the federal legislation but became effective after December 24, 1969. The Court of Appeals held the tax to be proper because the 1970 legislation constituted the affirmative legislative action required by the federal statute. But that Court did not consider the first point of our brief, the point we are elaborating on here.

Chapter 166 became effective on April 22, 1970. Our argument was that such a law was not proscribed by Pub. Laws Nos. 91-156, 83 Stat. 434 and Pub. L. No. 92-213, §4(a), 85 Stat. 775.

Section 3 of Pub. L. 91-156, 83 Stat. 434, provided:

> "(a) Except as provided in subsection (b) of this section, prior to January 1, 1973, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless * * *"
> (Underscoring supplied)

If the law in question became effective after December 24, 1969, as it did, it clearly did not impose a tax on the banks by or under authority of State legislation in effect prior to the enactment of the federal statute.

The tax involved in this case was not enacted, as taxpayers would have the Court believe, pursuant to the authority of chapter 257 of the Laws of 1963 but was enacted pursuant to Chapter 166 of the Laws of 1970. While it is true that chapter 166 amended the 1963 law, the tax authorized by the 1963 law was limited by the amendment, to the periods June 1, 1963 to May 31, 1970 and to the rates for that period which it set forth (2 1/2% - 5%). The tax involved here is for the period beginning June 1, 1970 and

is imposed at rates entirely different (2 1/2% - 7 1/2%) from those authorized prior to that date. Authority for its imposition was effected by adding entirely new language to the old 1963 law. The pertinent part of chapter 166, which demonstrates that the tax for the period involved here was entirely new is quoted below, with underscoring of the language added to subdivision 1 of section 1 of the earlier law by the 1970 law:

> "Notwithstanding any other provision of law to the contrary, any city having a population of one million or more is hereby authorized and empowered to adopt and amend local laws imposing in any such city a tax such as the legislature has or would have the power and authority to impose on persons occupying premises in such city for the purpose of carrying on or exercising any trade, business, profession, vocation or commercial activity, measured by the rent paid for the use or occupancy of such premises, but, for periods embraced in the period beginning June first, nineteen hundred sixty-three and ending May thirty-first, nineteen

hundred seventy, not to exceed two and one-half percentum of such rent where the rent is not in excess of twnety-five hundred dollars per year or where the rent is for a period of less than one year and would not exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year and not to exceed five percentum of such rent where the rent is in excess of twenty-five hundred dollars per year or where the rent is for a period of less than one year and would exceed twenty-five hundred dollars for the year if it were paid on an equivalent basis for the entire year. For periods beginning after May thirty-first, nineteen hundred seventy such tax shall be imposed at the rates shown in the following table. Where the rent is for a period of less than one year, the rate shall be determined by assuming that the rent is on an equivalent basis for the entire year.

Where the annual rent is:	But not more than:	The rate shall be:
0	$ 2499	2 1/2% of the rent
$ 2500 or over	$ 4999	5% of the rent
$ 5000 or over	$ 7999	6 1/4% of the rent
$ 8000 or over	$10999	7% of the rent
$11000 or over		7 1/2% of the rent"

It can thus be seen that the last two

sentences underlined above, authorized the tax with which we are dealing and were not in effect prior to the enactment of the federal legislation.

The City's local law, enacted pursuant to the 1970 State law, Local Law No. 20 for the year 1970, amended paragraph (1) of §L46-2.0 of the Administrative Code of the City of New York so that it imposed a tax:

> "For each tax year commencing on or after June first, nineteen hundred sixty-three and ending on or before May thirty-first, nineteen hundred seventy * * *".

That Local Law also added a paragraph (2) which read:

> "For each tax year commencing on or after June first, nineteen hundred seventy every tenant shall pay a tax at the rates shown in the following tables * * *".

Thus, even the local law separated the taxes for the period before June 1970 and for the period following. It is the above quoted

paragraph of the local law relating to 1970 and thereafter which was enacted pursuant to the authority granted by chapter 166 of the Laws of 1970, no part of which was in effect before the enactment of the Congressional legislation. It follows that the requirement for affirmative legislative action upon which taxpayers build their cases has no application to the taxes involved here. The condition precedent to that requirement has not been met; the tax was not authorized by a law effective prior to the federal legislation.

Authority for the maximum tax of 7 1/2% did not exist under the 1963 legislation. There was no authority to impose taxes at the higher rates which were authorized by the 1970 law. So that when the banks were presented with a determination calculated at the new higher rates for June 1970 to May

1972 that determination was made pursuant to the authority of a law not "in effect prior to the enactment" of the federal law, and not pursuant to the authority of the 1963 law. The authority to tax for 1970 and the following years was not in effect prior to the enactment of the federal law.

The amendment of the 1963 enabling act in 1970 had the effect, we believe, under the New York cases, of republishing and re-enacting the original act. At the very least, whether this was the effect of the amendment is a question for the Court of Appeals to determine, namely, did the 1970 Act constitute a re-enactment of the earlier Act. We shall discuss the New York cases on the question of re-enactment after we demonstrate the formalistic quality of the taxpayers' attack. The formalism can be illustrated by a hypothetical situation.

If, instead of enacting chapter 166 and amending the 1963 act, the legislature in 1970 had amended the 1963 act simply to end its period of applicability on May 31, 1970 and had enacted a new and separate enabling act precisely the same as the 1963 law except for higher rates, making the new act applicable on or after June 1, 1970, it would have accomplished precisely the same thing as it did in enacting chapter 166. Yet no one could possibly assert then that the tax in question here was imposed "under authority of any state legislation in effect prior to the enactment" of the federal act. The new and separate 1970 legislation would have been the only legislation authorizing the tax. There would have been no need for mentioning national banks in it. Nor would there have been any need for affirmative legislative action even if that action would have of

necessity been involved.

Because the legislature accomplished the same thing with less verbiage, we are told that the tax authorized for the later period at the higher rates was really imposed pursuant to the 1963 enabling act. It could not possibly have been imposed pursuant to that act which authorized only the old lower rates. For its imposition, it was necessary that the City have new legislation, and that legislation did not go into effect until after the federal provisions were enacted.

Other examples illustrate our point. The 1963 enabling act (L.1963, ch.257), in paragraph d of subsection 3 of its §1, provided that it did not authorize imposition of a tax on non-profit organizations operated for charitable, religious or educational purposes. Assume that in 1970 the legislature

amended this provision to strike out the word "educational" and to transpose the "or" and that the local law was similarly amended. Could it be said that the tax on educational institutions was authorized by legislation in effect since 1963? Of course authorization would have come in 1970 when the 1963 law was amended.

The effect of this Court's decision in Agricultural Bank v. Tax Comm'n., 392 U.S. 339 (1968) was precisely the same as if the 1963 enabling act had included a provision that it did not authorize imposing of a tax on national banks. The enactment of the 1970 legislation, since it made no reference to national banks, was analagous to the illustration in the preceding paragraph which struck out "educational".

The effect of an amending law on the law which it amends raises a question of state law. The amendment of the earlier statute is a re-enactment of that statute under the New York cases. The Court of Appeals did not consider this question because it held the tax to be valid on other grounds. We believe that, if certiorari is granted and the judgment is reversed, it should be a reversal with a remand to the Court of Appeals for determination of this question.

Remand of this kind to a state court is well illustrated by the case of Greyhound Lines v. Mealey, 334 U.S. 653 (1948). In that case the New York Court of Appeals had initially held that the receipts of a bus company for transportation between two points in New York State, the route of which passed through both

Pennsylvania and New Jersey, were not receipts from interstate commerce and were fully taxable. Central Greyhound Lines v. Mealey, 296 N.Y. 18; 68 N.E. 2d 849 (1946).

On appeal to this Court the judgment of the Court of Appeals was reversed. However, this Court noted that the tax statute involved was susceptible of a constitutional construction if it fairly apportioned the tax to the business done within the state, and remanded the case for determination of whether apportionment was authorized under the statute. On remand and reargument, the Court of Appeals held that the statute was susceptible of mileage apportionment and thus upheld an apportioned tax. Central Greyhound Lines v. Mealey, 298 N.Y. 876; 84 N.E. 2d 801 (1949).

This case presents a similar question. The other cases cited at page 8 of our brief in opposition, Spector Motor Co. v. McLaughlin, 323 U.S. 101 (1944) and N.A.A.C.P. v. Button, 371 U.S. 415 (1963) are analagous holdings.

Although the question of the effect of the amendment of an earlier law is one for the New York Court of Appeals to answer, we shall briefly quote from the cases which support our view, and demonstrate that our request for possible remand is founded upon authoritative decisions of that Court and is meritorious.

In People v. Wilmerding, 136 N.Y. 363; 32 N.E. 1099 (1893) the Court said: (p.368)

> "There is also another rule well established in this court which declares that a statute declaring a former statute to be thereby amended so as to read as prescribed in the amending act, is not a repeal of the original statute, and that from the time of the

> passage of the amendatory act such act is the only enactment on the subject as to future transactions, and the former statute is merged and lost in, and has no vitality distinct from, the amendatory act. And it has been held that a repeal of the amendatory act does not revive the original act, but both fall by virtue of the repeal of the later act. (Underscoring supplied).

And commenting on the case of People v. Supervisors, 67 N.Y. 109; 23 Am. R. 94 (1876) the Court said (p.369):

> "It was there distinctly decided that an earlier statute which was amended and re-enacted in the shape of an amendment, so as to read as prescribed in the later amendatory statute, was thereby wholly annulled as to all future cases and became merged and incorporated into the later statute."

People v. Supervisors, 67 N.Y. 109; 23 Am. R. 94 (1876) upon which Judge Peckham relied on deciding the Wilmerding case, is very similar to Wilmerding.

The Court of Appeals, in that case, said (p.118):

> "Although the former act remains upon the statute book and is not repealed, either expressly or by implication, it is no longer the law of the land in respect to new cases that may arise. In the case before us, the substance and body of the act of 1867 was incorporated in and made part of the act of 1873 * * * "

And later (p.370):

> "* * * enactment of the later statute of 1866 by reason of the language used in the first section thereof, did thereby incorporate into it all the life and force of the first section of the act of 1846, so that the later act stood from that time and as to all future cases as the sole and only exponent of legislative intent and power upon the subject and such act thereby utterly blotted out and annihilated the earlier statute, except as to rights or duties already existing."

In Matter of Rochester Water Commissioners, 66 N.Y. 413 (1876)* the Court of Appeals held that the portion of the statute which is amended by a later statute which repeats its

---

* Not reported unofficially.

language and adds to it is re-enacted. The Court stated (p.421):

> "The intent to continue the original section in force, with this new clause added, is made more apparent by reference to chapter 39 of the Laws of 1875, passed five days thereafter, which re-enacts section 23 of the act of 1872, with section 23 of chapter 33 of 1875 added to it." (Underscoring supplied)

(3)

For the reasons stated in our prior briefs, we again ask that certiorari be denied. However, if the Court should incline to grant a writ, with the summary reversal which the Solicitor General suggests, we ask that the case be remanded to the Court of Appeals for determination of the state question outlined in this brief.

Dated: December 13, 1978

Respectfully submitted,

ALLEN G. SCHWARTZ
Corporation Counsel of
The City of New York
100 Church Street
New York, N.Y. 10007
(212) 566-3327

SAMUEL J. WARMS,
MAURICE RAVAGE,

of Counsel.

Supreme Court, U. S.
FILED
AUG 23 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK AND THE FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY MEMORANDUM

J. PAUL MCGRATH
Attorney for Petitioner
The Chase Manhattan Bank, N.A.
140 Broadway
New York, New York 10005

JOHN T. KLUG
Attorney for Petitioner
Citibank, N.A.
53 Wall Street
New York, New York 10005

Of Counsel:
BOB D. MANNIS
Dewey, Ballantine, Bushby,
Palmer & Wood
W. FOSTER WOLLEN
Shearman & Sterling

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY MEMORANDUM

Argument

In their brief in opposition, respondents urge this Court to deny the petition for certiorari because the statute involved is no longer in effect. Respondents have misconstrued this Court's standards for granting writs of certiorari and have also understated the potential impact of this case.

Where the question is of sufficient importance, this Court will grant a writ of certiorari even though the statute involved has been repealed. In *Alaska* v. *American Can Co.*, 358 U.S. 224 (1959), this Court was asked to consider whether Alaska could collect a real and personal property tax for the years 1949 through 1952. Despite the repeal of

the tax statute in 1953, this Court granted certiorari. Similarly, in *Bigelow* v. *Virginia*, 421 U.S. 809 (1975), this Court granted certiorari to decide the First Amendment issue presented, even though the statute in controversy had been effectively repealed by amendment.

Respondents cite *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), for the proposition that this Court will not grant a petition for certiorari when the ultimate question cannot recur because of a superseding statute. *Rice*, however, is distinguishable because it involved constitutional issues which the Court desired to avoid, given the particular record. Justice Frankfurter spoke of "the evident difficulties of the case" and the Court's "duty to avoid decision of constitutional issues unless avoidance becomes evasion" as reasons for dismissing the writ of certiorari. 349 U.S. at 74, 77. Clearly, the instant case involves no such consideration.

This case does involve, however, the application by the court below of state law standards in construing a federal statute in clear contravention of the repeated directions of this Court and also involves the state court's blatant disregard of the language of the federal statute requiring affirmative action of the state legislature imposing the Commercial Rent Tax.

This case is of importance not only to the present litigants, but also to the other national banks whose liability for the Commercial Rent Tax is still open. Although the sums do not equal those involved here, petitioners are aware of disputes involving The First National Bank of Boston and New England Merchants National Bank which have both contested alleged liability for the Commercial Rent Tax for periods in 1970-1972 in reliance on the same grounds under Pub. L. No. 91-156 as are involved in this case. Therefore, respondents' assertion that this case has no impact beyond the petitioners is not true.

The case under review is analogous to *Alaska* v. *American Can Co., supra,* because tax liability in substantial sums is at issue. Moreover, the court below has erroneously decided an important question of federal law concerning the extent to which states and their subdivisions may tax national banks. For these reasons, this Court should grant certiorari.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: August 23, 1978

Respectfully submitted,

J. Paul McGrath
Attorney for Petitioner
The Chase Manhattan Bank, N.A.
140 Broadway
New York, New York 10005

John T. Klug
Attorney for Petitioner
Citibank, N.A.
53 Wall Street
New York, New York 10005

Of Counsel:
Bob D. Mannis
Dewey, Ballantine, Bushby,
Palmer & Wood
W. Foster Wollen
Shearman & Sterling

Supreme Court, U. S.
FILED
DEC 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK AND THE FINANCE ADMINISTRATOR OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY TO RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

J. PAUL MCGRATH
Attorney for Petitioner
The Chase Manhattan Bank, N.A.
140 Broadway
New York, New York 10005

JOHN T. KLUG
Attorney for Petitioner
Citibank, N.A.
53 Wall Street
New York, New York 10005

Of Counsel:
BOB D. MANNIS
Dewey, Ballantine, Bushby,
Palmer & Wood
W. FOSTER WOLLEN
Shearman & Sterling

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1659

THE CHASE MANHATTAN BANK, N.A. and
CITIBANK, N.A.,

Petitioners,

v.

THE FINANCE ADMINISTRATION OF THE CITY
OF NEW YORK AND THE FINANCE ADMINISTRATOR
OF THE CITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

PETITIONERS' REPLY TO RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

In their recently filed "Second Supplemental Brief", respondents raise for the first time in this Court an argument to which petitioners ask leave to submit this brief response.

Respondents now argue that the commercial rent or occupancy tax had not been imposed "by or under authority of any State legislation in effect prior to the enactment of this Act [in 1969] . . ." within the meaning of the federal statute in question. This argument was not advanced before apparently because: (1) it makes no sense in light of the purpose of the federal statute; (2) it is flatly contrary to

federal and New York case law; and (3) it is inconsistent with the opinion of the New York Court of Appeals.

(1) It is undisputed that the only relevant 1970 change which the New York legislature made in the commercial rent or occupancy tax was to increase the rate of that tax. Otherwise the legislature simply continued in effect a tax which had been levied on state banks "by and under the authority" of previous New York state legislation. As a matter of construction of the federal statute in question there is no logical reason for the conclusion that the mere change in the rate of this tax means that it was not a tax in effect prior to 1969. On the contrary, it is clear that the tax in question was imposed on New York state banks prior to that date—exactly the situation that triggered the operation of the affirmative action requirement of the federal statute in question.

(2) Moreover, as a matter of law, it is clear that the commercial rent or occupancy tax was a continuing tax that had been in effect for years prior to the 1970 amendment. In form, Chapter 166 of the Laws of New York, 1970, simply restated the existing statute by providing that it was "amended to read as follows" and (to the extent here relevant) adopted word for word the language of the existing statute except for the new rates. In such a situation the federal decisions, which are controlling here, have consistently held that the statute should be deemed to be continuously in force from the date of the first enactment. *Steffler* v. *Johnston*, 121 F.2d 447 (9th Cir.), *cert. denied*, 314 U.S. 676 (1941); *McClure* v. *United States*, 95 F.2d 744, 749 (9th Cir. 1938), *aff'd on other grounds*, 305 U.S. 472 (1939). Incidentally, the law in the New York state courts is to the same effect. *Moore* v. *Mausert*, 49 N.Y. 332, 335 (1872); *Ely* v. *Holton*, 15 N.Y. 595, 599 (1857); *Baylis* v. *Van Nostrand*, 176 App. Div. 396 (2nd Dep't 1917); *Harwood* v. *City of Rensselaer*, 67 Misc. 2d 504 (Sup. Ct. 1971).

(3) In the Court of Appeals the majority recognized this well-established rule of law, when it stated:

> "It is a well-established proposition of law that an amendment is a reenactment of the statute amended, albeit without any break in the continuity between the statute before amendment and the statute after amendment (see *Lyon* v. *Manhattan Ry. Co.*, 142 NY 298, 303-304)." (Petition, Appendix B-5 to B-6.)

Dated: December 21, 1978

Respectfully submitted,

J. Paul McGrath
Attorney for Petitioner
The Chase Manhattan Bank, N.A.
140 Broadway
New York, New York 10005

John T. Klug
Attorney for Petitioner
Citibank, N.A.
53 Wall Street
New York, New York 10005

Of Counsel:
Bob D. Mannis
Dewey, Ballantine, Bushby,
Palmer & Wood

W. Foster Wollen
Shearman & Sterling

No. 77-1659

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE CHASE MANHATTAN BANK, N.A., ET AL.,
PETITIONERS

v.

THE FINANCE ADMINISTRATION OF THE
CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

GARY R. ALLEN
RICHARD FARBER
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Question presented	1
Statement	2
Discussion	7
Conclusion	13

CITATIONS

Cases:

Agricultural Bank v. *Tax Commission*, 392 U.S. 339	3, 4, 11
Carpenter v. *Shaw*, 280 U.S. 363	11
Des Moines Nat'l Bank v. *Fairweather*, 263 U.S. 103	3
Diamond National v. *State Equalization Board*, 425 U.S. 268	11
First Nat'l Bank v. *Hartford*, 273 U.S. 548	3
Iowa-Des Moines Nat'l Bank v. *Bennett*, 284 U.S. 239	3
McCulloch v. *Maryland*, 4 Wheat 316	3
Owensboro Nat'l Bank v. *Owensboro*, 173 U.S. 664	3
Society for Savings v. *Bowers*, 349 U.S. 143	11
United States v. *American Friends Service Committee*, 419 U.S. 7	13
United States v. *Mississippi Tax Comm'n*, 421 U.S. 599	11
United States v. *Pomponio*, 429 U.S. 10	13

Statutes:

Act of June 3, 1864, ch. 106, Section 41, 13 Stat. 111	3

Statutes—Continued — Page

Act of February 10, 1868, ch. 7, 15 Stat. 34 3
Act of March 4, 1923, ch. 267, 42 Stat. 1499 3
Act of March 25, 1926, ch. 88, 44 Stat. 223 3
Act of December 22, 1971, Pub. L. No. 92-213, Section 4(a), 85 Stat. 775 4
Rev. Stat. Section 5219, as amended by Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434 *et seq.* (12 U.S.C. 548) 1, 2, 3, 4, 5, 6, 9, 10, 11
Section 1 ..... 5, 11
Section 1(2) 11
Section 1(4) 11
Section 2 4
Section 3(a) 5, 6, 7, 12
Section 3(a)(2) 6
Section 3(b) 6, 7, 10, 12
Section 3(b)(3) 5
1963 N.Y. Laws ch. 257, as amended by N.Y. Unconsol. Laws ch. 166, § 9447 (McKinney 1974) 2

Miscellaneous:

H. R. Conf. Rep. No. 91-728, 91st Cong., 1st Sess. (1969) 8
S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969) 4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1659

THE CHASE MANHATTAN BANK, N.A., ET AL., PETITIONERS

v.

THE FINANCE ADMINISTRATION OF THE CITY OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of October 2, 1978, inviting the Solicitor General to express the views of the United States in this case.

QUESTION PRESENTED

The United States will address the question whether Section 5219 of the Revised Statutes (12 U.S.C. 548) bars the imposition of the New York City com-

mercial rent tax upon national banks for periods prior to January 1, 1973.

STATEMENT

1. Petitioners are national banks that lease and occupy premises in New York City for the purpose of conducting their business activities. For their taxable years ended May 31, 1971 and May 31, 1972, New York City imposed a Commercial Rent or Occupancy Tax pursuant to Title L of Chapter 46 of the Administrative Code of the City of New York, as authorized by the legislature of the State of New York (Pet. App. E-5, E-9). The commercial rent tax is levied on persons occupying premises for commercial purposes and varies in accordance with the amount of rent paid. 1963 N.Y. Laws ch. 257, as amended by N.Y. Unconsol. Laws ch. 166, § 9447 (McKinney 1974) (Pet. App. H-1 to H-8).

Petitioners Chase Manhattan Bank, N.A. and Citibank, N.A. brought these proceedings in the Appellate Division of the New York Supreme Court challenging rent tax assessments against them in the respective amounts of $3,097,732.94 and $2,702,-909.84. They contend that Section 5219 of the Revised Statutes, as amended by the Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434 (12 U.S.C. 548), bars the imposition of the commercial rent tax upon national banks prior to January 1, 1973 (Pet. App. B-2 & n.1).

As the decision below observed (Pet. App. B-2 to B-3), state taxation of national banks has been the subject of a series of decisions of this Court and

federal legislation. In 1819, this Court held unconstitutional a state tax on the Bank of the United States on the ground that it amounted to "a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution." *McCulloch* v. *Maryland*, 4 Wheat. 316, 436-437 (1819). Subsequent to *McCulloch*, a long line of decisions by this Court established that the states are without power, unless authorized by Congress, to tax national banks. See, *e.g.*, *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664, 668 (1899); *Des Moines Nat'l Bank* v. *Fairweather*, 263 U.S. 103, 106 (1923); *First Nat'l Bank* v. *Hartford*, 273 U.S. 548, 550 (1927); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 244 (1931).

In response to these decisions, Congress enacted a series of statutes which in the aggregate allowed state taxation of national banks in any one of four specified ways in addition to taxes on their real estate.[1] See Section 41 of the Act of June 3, 1864, ch. 106, 13 Stat. 111; Act of February 10, 1868, ch. 7, 15 Stat. 34; Act of March 4, 1923, ch. 267, 42 Stat. 1499; Act of March 25, 1926, ch. 88, 44 Stat. 223, as incorporated in Revised Statutes Section 5219 (12 U.S.C. 548). This Court characterized the 1864 legislation as marking "the outer limit within which

---

[1] The four specified ways were: (1) taxation of the shares of the bank; (2) the inclusion of bank dividends in the taxable income of a shareholder; (3) the taxation of banks on their net income; or (4) the imposition of a tax according to or measured by the bank's net income. See *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, 341-342 n.3 (1968).

States can tax national banks" (392 U.S. at 345). It therefore held that a state sales tax, which by its terms must be passed on to the purchaser, was invalid as applied to national banks because such taxes were not among the four specified methods of taxation permitted by Congress in 12 U.S.C. 548. *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339 (1968).

After this Court's decision in *Agricultural Bank*, Congress concluded that there was "no longer any justification for * * * continuing to grant national banks immunities from State taxation which are not afforded State banks." S. Rep. No. 91-530, 91st Cong., 1st Sess. 2 (1969). Accordingly, Congress enacted both "permanent" and "temporary" amendments to Section 5219 of the Revised Statutes. See Act of December 24, 1969, Pub. L. No. 91-156, 83 Stat. 434. The "permanent" amendment provides that for purposes of state as well as federal taxation, "a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located" (Pub. L. 91-156, *supra*, at Section 2). However, the effective date of the "permanent" amendment was deferred until January 1, 1973 in order to permit the states to conform their tax statutes to the new provisions. See S. Rep. No. 91-530, 91st Cong., 1st Sess. (1969); Act of December 22, 1971, Pub. L. No. 92-213, Section 4(a), 85 Stat. 775.

The "temporary" amendment governs taxation of national banks during the transition period between the date of the Act (December 24, 1969) and the

effective date of the "permanent" amendment (January 1, 1973). Under the "temporary" amendment, the states could tax national banks on the same basis as state banks except that they could not impose a tax on intangible personal property and were limited in the manner in which they could tax national banks having a principal place of business in another state. Pub. L. No. 91-156, *supra*, at Section 1.

The "temporary" amendment was subject to a "saving provision" precluding, during the transition period, the imposition on national banks of new taxes (*i.e.*, taxes not authorized under Section 5219 as it read before the enactment of Pub. L. No. 91-156) unless the imposition of such taxes was "authorized by *affirmative action* of the State legislature after the enactment of this Act" (emphasis supplied). Pub. L. No. 91-156, *supra*, at Section 3(a). However, such affirmative action was not necessary for sales or use taxes, taxes on the execution or recordation of documents, or taxes on tangible personal property, where such taxes were "imposed by a State which does not impose a tax, or an increased rate of tax, in lieu thereof." Pub. L. No. 91-156, *supra*, at Section 3 (b)(3).

2. In this suit challenging assessments of the New York City commercial rent tax for the period June 1, 1970 through May 31, 1972, petitioners claimed immunity on the authority of Section 3(a) of Pub. L. No. 91-156, which protected them from losing any pre-existing immunity from state taxes unless and until the New York legislature took "affirmative action" to apply such taxes to them. In petitioners' view, the

New York City commercial rent tax, which had been in force since 1963, was neither newly enacted nor the object of the requisite "affirmative action" of the New York legislature prior to the assessments at issue. In response, the City contended that the 1970 modification of the rent tax, which increased the applicable rates, constituted the requisite "affirmative action" within the meaning of Section 3(a).

The Appellate Division of the New York Supreme Court upheld the assessments, with one justice dissenting (Pet. App. D). In a 4-3 decision, the Court of Appeals of New York affirmed (Pet. App. B). It held that the state legislature had taken the requisite affirmative action when it increased the general rate of the tax in 1970. Although there was no evidence that the legislature took this action with the intention of imposing the commercial rent tax on national banks, the court held that Pub. L. No. 91-156 did not require an express legislative intent to tax national banks (Pet. App. B-5 to B-7). As an alternative ground for its decision, the court held that the rent tax was a "tax on tangible personal property" under New York law and was therefore exempt from the "affirmative action" requirement of Section 3(a) of Pub. L. No. 91-156 by virtue of the exception in Section 3(b) (Pet. App. B-7 to B-9).

The three dissenting judges disagreed with respect to both grounds of the decision. In their view, the "affirmative action" contemplated by Section 3(a) required a "conscious and manifested determination on the part of the State legislature" to subject national banks to the imposition of the newly permitted state taxes (Pet. App. B-10). They further concluded that the 1970 action of the New York legislature in increasing the rent tax rates, taken wholly without reference to the federal statute, was not "affirmative action" within the meaning of the federal statute. Finally, the dissenting judges observed that the characterization of the rent tax under New York law as a tax on tangible personal property was not controlling for purposes of construing Section 3(b) of Pub. L. No. 91-156, and that respondents had never asserted that the rent tax was a tax on tangible personal property (Pet. App. B-9 to B-13).

DISCUSSION

The decision below erroneously imposed the New York City rent tax upon petitioners for periods prior to January 1, 1973.

1. The 1970 increase in the tax rate does not constitute the requisite "affirmative action" within the meaning of Section 3(a) of Pub. L. No. 91-156. Although Congress did not define the statutory term "affirmative action," the legislative history shows that a general increase in the rate of an existing tax, without an express intent to subject national banks to the tax, is not affirmative action. As the pertinent Senate Committee Report (S. Rep. No. 91-530, *supra*, at 6) explained, the reason for the requirement that "the imposition of the tax" be "authorized by [affirmative] action of the State legislature after the enactment [of Pub. L. 91-156]" was as follows:

The committee realizes that for many years the tax structure within the States has been drawn in recognition of the different positions of State and National banks with respect to liability for State taxes. In effect, the States have adopted many different formulas in an attempt to equalize the total tax burden between State and National banks. If by congressional action banks were automatically subject to taxes which they had not been previously paying, in addition to the taxes which they are now paying, the effect may be to destroy the degree of equality that the State Legislature, by conscious effort, attempted to achieve. Accordingly, the committee believes it wise *to require positive state legislative action as a prerequisite to the imposition on banks of the additional taxes authorized by the bill* [emphasis supplied].

Similarly, the Conference Report (H.R. Conf. Rep. No. 91-728, 91st Cong., 1st Sess. 5 (1969) (emphasis supplied)) states:

> [W]hile at the same time very firmly committing to * * * their own tax policies, the conference substitute includes a saving provision to the effect that except for sales taxes, documentary taxes, and property taxes, *a tax may not be applied to a bank after the enactment of this legislation unless* either the tax was applicable before the enactment of this legislation, or *the State legislature authorizes its imposition by affirmative action taken after the enactment of this legislation.*

The foregoing excerpts from the legislative history establish that for the transition period 1969-1973,

Congress sought to insure that national banks would not be subject to new state tax burdens unless the state legislature explicitly determined to impose them on such banks. This congressional intent is served where there has been conscious and deliberate action by the legislature, subsequent to the enactment of Pub. L. No. 91-156, to subject national banks to taxes from which they previously were immune. On the other hand, the congressional purpose would be thwarted when taxes not previously permitted are imposed upon national banks on the basis of actions of the legislature which manifest no conscious or deliberate choice to subject national banks to the tax pursuant to the expanded taxing authority provided by the amendment to 12 U.S.C. 548.

Here, the commercial rent tax at issue was first enacted in 1963 and antedates the 1969 amendment to 12 U.S.C. 548. It therefore could not be imposed upon national banks without the affirmative action of the state legislature. But the general increase in the tax rate enacted by the New York legislature does not manifest a conscious intent to impose the tax upon national banks that had previously been immune from such taxes. All such a general increase in rates manifests is an intention of the legislature to impose heavier tax burdens on those to whom the levy was properly applicable. It does not demonstrate an intent to extend the reach of the commercial rent tax beyond the bounds that then existed. Indeed, as the dissenting judges pointed out (Pet. App. B-11), "[n]o shred of contemporaneous proof suggests that either

the city administration or the State Legislature was even aware that section 5219 had been amended or that thereby the Congress had granted authority for expanded State taxation of national banks." In these circumstances, it cannot be said that the action of the New York legislature focused upon the tax status of the national banks so as to constitute the "positive State legislative action" required by Congress for the taxation of national banks during the interim period from December 24, 1969 until January 1, 1973.[2]

2. The alternative ground of the decision below is likewise erroneous. Section 3(b) of Pub. L. No. 91-156 provides that "affirmative action of the State legislature" is not required with respect to taxes on tangible personal property, if the State has not imposed a tax or increased a rate of tax "in lieu thereof" (see Pet. App. G-4). The court below alternatively held that the commercial rent tax was a tax on tangible personal property that did not require affirmative action of the state legislature. In so ruling, the court relied upon New York decisions that have characterized a leasehold as tangible personal property (see Pet. App. B-7 to B-9).

---

[2] The decision below attempted to justify its holding on the further ground that the 1970 amendment to the statute constituted a re-enactment of the original 1963 law and therefore constituted the requisite "affirmative action" (see Pet. App. B-5 to B-6). See also Resp. Br. in Opp. 7-8. But since national banks were immune under the original statute, its re-enactment, without any conscious intent to tax national banks, is not the affirmative action by the state legislature contemplated by Congress.

But for purposes of this case involving the scope of a federal immunity statute, the characterization of the commercial rent tax does not turn upon state law. As this Court has observed, "[w]here a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930), as quoted in *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955). Accord: *Agricultural Bank* v. *Tax Commission, supra*, 392 U.S. at 347; *Diamond National* v. *State Equalization Board*, 425 U.S. 268 (1976); *id.* at 269 & n.2 (Stevens, J., dissenting); *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 609 n.7 (1975).

Here, the terms and structure of Pub. L. No. 91-156 convincingly refute the notion that a tax on rents imposed upon the lessee is a tax on tangible personal property. Section 1 of the statute explicitly distinguishes between taxes on real property or on the *occupancy* of real property on one hand (subparagraph (2)) and taxes on tangible personal property (not including cash or currency) on the other (subparagraph (4)). It is therefore apparent that Congress intended that a tax on the occupancy of real property be regarded as equivalent to a tax on real property and not to a tax on tangible personal property. Indeed, the insubstantiality of the alternative ground of the decision below is underscored by the fact that respondents have never asserted at any

stage of this litigation that the rent tax is a tax on tangible personal property within the meaning of Section 3(b) so as to be exempt from the affirmative action requirement of Section 3(a). Moreover, in their brief in opposition, respondents make no attempt to defend this alternative ground of the decision below.

3. We recognize that the question presented by the petition has no continuing significance because it involves the applicability of the New York City commercial rent tax on national banks only for periods prior to January 1, 1973. That fact would normally constitute appropriate reason for this Court to decline to exercise its discretionary certiorari jurisdiction. However, if the decision in this case is permitted to stand, we are advised by counsel for petitioners that petitioners will be liable for more than $9 million in taxes and interest for the periods at issue.[3] In our view, the patent misconstruction of the federal statute by the New York Court of Appeals in upholding these substantial assessments is a sufficient reason for review by this Court despite the limited effect of the decision below. Given the narrow scope of the issue and the full discussion of the

[3] The amounts at issue fall into three distinct categories: (1) taxes through May 31, 1972; (2) taxes for the period June 1, 1972-December 31, 1972; and (3) interest through December 31, 1978.

For petitioner Chase, the amounts in each of these categories are as follows: (1) $2,178,000; (2) $682,500; and (3) $1,810,500. For petitioner Citibank, the amounts are as follows: (1) $2,019,975; (2) $690,204; and (3) $1,706,206. For both petitioners, the total of these amounts is $9,087,385.

pertinent authorities in the papers filed by the parties, the Court may deem it appropriate to grant certiorari and summarily reverse. A similar course has been followed in the past when the Court has concluded that full briefing and argument are unnecessary. See, *e.g.*, *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974); *United States* v. *Pomponio*, 429 U.S. 10 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

GARY R. ALLEN
RICHARD FARBER
Attorneys

DECEMBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 279435 227